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THE LAW OF THE SEA

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THE LAW OF THE SEA

**A MANUAL OF THE PRINCIPLES OF ADMIRALTY LAW
FOR STUDENTS, MARINERS, AND SHIP OPERATORS**

BY

GEORGE L. CANFIELD

OF THE MICHIGAN BAR

AND

GEORGE W. DALZELL

OF THE BAR OF THE DISTRICT OF COLUMBIA

**WITH A SUMMARY OF THE NAVIGATION LAWS
OF THE UNITED STATES**

BY

JASPER YEATES BRINTON



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NEW YORK LONDON
1921

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EDITORS' PREFACE

This is the third volume of a series of manuals dealing with the business of ocean shipping and transportation. The first volume published dealt with steamship traffic operation and was written by Professor G. G. Huebner. The second volume was upon "Marine Insurance," the author being Professor S. S. Huebner. In the first volume published, the following preface appeared:

"This volume upon the management of ocean steamship traffic is the first of a series of manuals designed to assist young men in training for the shipping business. The necessity for such a series of manuals became evident when, as a result of the great war, the tonnage of vessels under the American Flag was, within a brief period, increased many fold. To carry on the war and to meet the demands of ocean commerce after the war, the United States Government, through the Shipping Board and private shipyards, brought into existence a large mercantile marine. If these ships are to continue in profitable operation under the American Flag, the people of the United States must be trained to operate them. Steamship companies, ship-brokers and freight-forwarders must all be able to secure men necessary to carry on the commercial and shipping activities that make use of the ships. A successful merchant marine requires ships, men to man the ships, and business organization to give employment to the vessels.

"In its Bulletin upon 'Vocational Education for Foreign Trade and Shipping' (since republished as 'Training for Foreign Trade,' Miscellaneous Series No. 97, Bureau of Foreign and Domestic Commerce, for sale by the Superintendent of Documents), the Federal Board for Vocational Education includes among other courses suggested for foreign trade training two shipping courses upon subjects with which exporters should be familiar, namely, 'Principles of Ocean Transportation' and 'Ports and Terminals.' Although such general courses are helpful to the person engaging in the exporting business, a training for the steamship business

as a profession requires much greater detail in the knowledge of concrete facts of a routine nature. An analysis was made of the various divisions of the steamship office organization and it was suggested to the United States Shipping Board that as no literature existed of sufficient practicability and detail several manuals should be written covering the principal feature of shore operations.

"The response of the Shipping Board was hearty. The Shipping Board appointed Mr. Emory R. Johnson of its staff, then conducting an investigation of ocean rates and terminal charges, as its editor. The Federal Board for Vocational Education designated Mr. R. S. MacElwee, then engaged in the preparation of studies in foreign commerce. Before the project was completed Mr. Johnson severed his connection with the Shipping Board in 1919, and January, 1919, Mr. MacElwee became Assistant Director of the Bureau of Foreign and Domestic Commerce, Department of Commerce. The interest of the editors in the project did not terminate, however, and their close coöperation has been voluntarily continued out of conviction that the works will be helpful.

"The books have been written with a view to their being read by individual students conducting their studies without guidance, also with the expectation that they will be used as class textbooks. Doubtless colleges, technical institutes and high schools having courses in foreign trade, shipping business and ocean transportation, will desire to use these volumes as class texts in a manner outlined in 'Training for the Steamship Business,' by R. S. MacElwee, Miscellaneous Series 98, Bureau of Foreign and Domestic Commerce, Superintendent of Documents, Washington, D. C. It is expected that evening classes and part-time schools, organized under the patronage of the Federal Board for Vocational Education, Chambers of Commerce, and other interested organizations will find the manuals useful. Should these volumes accomplish the desired purpose of giving the American people a somewhat greater proficiency in the business of operating ships, they will have proven successful."

This volume on "The Law of the Sea" is intended to present the principles of admiralty law in concise and practical form. It is a manual for the student, the owner, or the master of a

EDITORS' PREFACE

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vessel who may desire to acquire information concerning the main facts and principles of maritime law without attempting to acquire such a mastery of the subject as is possessed by an admiralty lawyer.

THE EDITORS

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AUTHORS' PREFACE

This book is not an exhaustive treatise or a compendium of authorities. It is designed to be an outline of the subject primarily for the student, more especially the student layman who desires to inform himself of the general principles of admiralty law.

It is impracticable in a work of this sort to reprint the statutes relating to the various subjects of admiralty jurisprudence, since the federal statutes alone would constitute a volume more extensive than this. The salient features of the statutes have been noticed and references given to all of them. They are to be found in the Revised Statutes, the Compiled Statutes, the Statutes at large, and in the compilation of Navigation Laws published by the Bureau of Navigation, U. S. Department of Commerce.

The subject of marine insurance is treated in another volume of this series and is, therefore, omitted here.

In the chapter on Collision, we have not discussed the fixing of liability under particular circumstances of navigation, such as collision between vessels meeting, vessels passing, etc. While these matters are treated in most text-books, their discussion belongs largely to navigation and is useful only in a legal treatise for the purpose of determining liability after an accident has occurred. It could not guide the reader to avoid collision liability, and is therefore omitted in a work intended rather as a guide for the avoidance of trouble than as a dictionary of remedies.

For the same reason, only the most cursory sketch of admiralty procedure has been given. That is the province of the proctor, who must be consulted when litigation has become necessary.

The reader will find that a few subjects treated in the body of the work are also covered in Appendix I (Summary of the Navigation Laws). This is due to the fact that the appendix was prepared for independent publication. The repetitions are not

numerous and, as the treatment is different in form, it will be found advantageous to the student rather than otherwise.

Acknowledgment is made to Miss Florence A. Colford of the District of Columbia bar, for valuable and painstaking aid.

G. L. C.

G. W. D.

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THE LAW OF THE SEA

CHAPTER I

MARITIME LAW

1. **General Maritime Law.**—Navigation and commerce by sea are regulated by maritime law. This is a branch of jurisprudence which developed out of the necessities of the business with which it has to deal. It is, therefore, as old as navigation itself and many of its rules can be traced back to antiquity. It extends over all navigable waters and is enforced by courts of admiralty.

This law is to be found in the statutory laws of different countries, the decisions of the courts and text-books on the subjects involved. Back of the laws of each particular country is what is termed the general maritime law or common law of the sea, which, like the common law of the land, consists of that general mass of usages and customs which exists by the universal consent and immemorial practice of those doing business by sea. It is effective within particular countries only so far as they consent to follow it, as is the case with international law, of which it is really a part. In general, however, it is recognized and enforced wherever the local laws are silent in regard to maritime transactions.

2. **Sources in United States.**—In the United States, the maritime law is to be found in the Statutes or Acts of Congress and decisions of the Federal Courts. These decisions are published in the United States Reports, Federal Cases and Federal Reporter. In addition there are numerous text-books, among which may be mentioned Parsons on *Shipping and Admiralty*; Benedict's *Admiralty*; Hughes on *Admiralty*; Desty on *Shipping and Admiralty*; Spencer on *Collisions* and Flanders on *Maritime Law*. The highest authority is, of course, to be found in the *Decisions of the Supreme Court of the United States*.

3. **Courts.**—The Constitution provides that the judicial power of the United States shall extend to all cases of admiralty and

maritime jurisdiction; this jurisdiction is confided to the District Courts, of which there are several in each state; appeals lie from their decisions to the Circuit Courts of Appeals; there are nine of these, corresponding to the nine judicial circuits into which the nation is divided; the Supreme Court has a general supervisory jurisdiction over all other courts. While parties having maritime controversies may resort to state courts in cases where the common law affords a remedy, the admiralty jurisdiction of the federal courts is so much more effective in all matters pertaining to the ship that they handle practically all the litigation on the subject.

4. **Jurisdiction.**—*a. The Ship.*—According to the maritime law of the United States the ship is not within the jurisdiction of the admiralty until she is completed; while she is engaged in commerce and navigation, that jurisdiction is exclusive; when she becomes a wreck and passes out of the business for which she was intended, the jurisdiction relaxes and is finally withdrawn. Therefore our admiralty does not take cognizance of matters growing out of the building of the ship nor of the controversies arising after she is broken up.

It sometimes becomes a question of some difficulty whether a particular object is or is not a vessel and subject to admiralty jurisdiction. Rev. Stat., § 3, define "vessel" as including "every description of watercraft or other artificial contrivance, used or capable of being used as a means of transportation by water," and in *General Cass*, 1 *Brown Adm.* 334, it was said:

The true criterion by which to determine whether any watercraft or vessel is subject to admiralty jurisdiction is the business or employment for which it is intended, or is susceptible of being used, or in which it is actually engaged, rather than size, form, capacity or means of propulsion.

In one or two old cases it was held that a dredge was not a ship but the preponderance of authority is to the effect that a dredge is a ship and within admiralty jurisdiction. The question whether a raft of logs is a vessel has been variously decided. If it be a mere pile or series of floating logs it is probably not a vessel, but rafts made of cross-ties, used as a convenient mode of bringing them to market, manned by crew, who lived thereon during the voyage and propelled by the current and by poles and oars, have been held to be a ship and subject to admiralty juris-

diction.¹ So, also, a floating bathhouse, not permanently moored, but which was towed from place to place has been held to be a vessel; whereas a floating drydock, kept permanently moored, is not a vessel. The question whether barges and floats are subject to admiralty jurisdiction has been the subject of frequent adjudication, and while some old cases held that they were not, the tendency of the modern decisions is to hold that such crafts are vessels. In the *Mac*, 7 P. D. 126, the question was whether a hopper barge was a ship. It was decided in the affirmative by the English Court of Appeal, Lord Justice Brett saying:

The words "ship" and "boat" are used; but it seems plain to me that the word "ship" is not used in the technical sense as denoting a vessel of a particular rig. In popular language ships are of different kinds; barques, brigs, schooners, sloops, cutters. The word includes anything floating in or upon the water, built in a particular form, and used for a particular purpose. In this case the vessel, if she may be so called, was built for a particular purpose; she was built as a hopper-barge; she has no motive power, no means of progression within herself. Towing alone will not conduct her; she must have a rudder; and, therefore, she must have men on board to steer her. Barges are vessels in a certain sense; and, as the word "ship" is not used in a strictly nautical meaning, but is used in a popular meaning, I think that this hopper-barge is a "ship." . . . This hopper-barge is used for carrying men and mud; she is used in navigation; for to dredge up and carry away mud and gravel is an act done for the purposes of navigation. Suppose that a saloon-barge, capable of carrying 200 persons, is towed down the river Mersey in order to put passengers on board of vessels lying at its mouth; she would be used for the purposes of navigation, and I think it equally true that the hopper-barge was used in navigation.

b. The Waters.—The waters included in admiralty jurisdiction are, first, the sea; second, streams in which the tide ebbs and flows; and third, waters which carry substantial water-borne commerce. The fact that a navigable stream may lie entirely within the borders of a single state and thus be unnavigable for interstate commerce, does not exclude the admiralty jurisdiction. Nice questions occasionally come before the courts in determining whether or not a particular body of water is navigable and therefore within the admiralty jurisdiction. There seems to be no

¹ "The first vessels were rafts. The raft is the parent of the modern ship" (*Seabrook v. Raft*, 40 Fed. 596).

precise test, beyond the capacity of the stream to carry substantial commerce.

5. Maritime Contracts and Torts.—The general subject matter of admiralty jurisdiction is maritime contracts and maritime torts or injuries. A contract is maritime when it relates to the ship as an instrument of commerce and navigation. Thus the hiring of a master, the purchase of supplies, the charter-party or bill-of-lading, an agreement of towage, and the like are maritime contracts. The principle by which to determine whether a contract is maritime in its nature, was laid down by the Supreme Court in the case of the *Belfast*, 7 Wall. 624: "Contracts, claims, or service, purely maritime and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty courts." And in *Insurance Co. v. Dunham*, 11 Wall. 1:

As to contracts, it has been equally well settled that the English rule which concedes jurisdiction, with a few exceptions, only to contracts made upon the sea and to be executed thereon (making locality the test) is entirely inadmissible and that the true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions.

Perhaps the best criterion of the maritime character of a contract is the system of law from which it arises and by which it is governed. And it is well known that the contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom.

The test is not altogether definite, nor always easy to apply. As was said in *Grant v. Poillon*, 20 How. 162: "It may be difficult, if not impracticable, to state with precision the line of this jurisdiction, but we may approximate it by consulting the decisions of our own courts."

A tort is a wrong, independent of contract, that is, it is the breach of a duty which is imposed by law and not by contract. A tort is maritime when it is committed on navigable waters. Injuries to sailors on shipboard, damage to cargo and collision at sea are maritime torts. Illustration of maritime torts and a distinction between land and maritime torts will be found in the chapters on Collisions and Maritime Liens, *infra*. The case of *Hough v. Western Transportation Co.*, 3 Wall. 20, may be men-

tioned here. A vessel made fast to a wharf took fire by the negligence of the master and crew. The fire was communicated to the wharf and destroyed it with the buildings adjacent thereto. The court held that although the origin of the wrong was on the water, the substance and consummation of the injury occurred on land and the case was not within admiralty jurisdiction.

Salvage and general average are, strictly, neither contract nor tort, but are within admiralty jurisdiction by virtue of the general law.

6. Personality of Ship.—In considering the maritime law, it is important to remember that one of its underlying ideas is that the ship has a personality of her own. In the common law, or law of the land, there is a similar notion in regard to corporations; they are legal persons quite apart from the stockholders who compose them. So the ship has a legal individuality quite apart from that of her owners. She may sue in the name of her owner and be sued in her own name. The principle has been expressed by the Supreme Court:

A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject only to mechanics' liens created by a state law and enforceable in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name. Her owner's agents may not be her agents, and her agents may not be her owner's agents. She is capable, too, of committing a tort, and is responsible in damages therefor. She may also become a quasi bankrupt; may be sold for the payment of her debts, and thereby receive a complete discharge from all prior liens, with liberty to begin a new life, contract further obligations, and perhaps be subjected to a second sale. *Tucker v. Alexandroff*, 183 U. S. 424, 438.

7. Limits of Liability.—It is important in all dealings with the ship, whether by way of investment of capital, or labor, or by entrusting goods to her for carriage, or by making repairs or furnishing supplies, to remember that the ship may be both the basis and the limit of financial liability, unless her owners in some way add their personal responsibility thereto. It was appreciated

at an early day in the history of navigation that capitalists would not invest in ships unless there was some limit to their liability on that account. Ships are wanderers and capitalists can seldom navigate them. No form of investment can produce such large liabilities at any time. The owners can not supervise them in person but must entrust their operations to others beyond their control. Hence, out of the necessities of the situation, the doctrine developed that the ship must be treated as an individual, responsible for her own acts, and that the owner's responsibility was limited to his investment unless he personally went beyond this protection.

8. Equitable Principles.—The maritime law proceeds on equitable principles and endeavors to accomplish substantial justice between litigants, with brevity, celerity and simplicity. It is impatient at technicalities and cunning bargains. Its jurisdiction is not limited by any financial amount or geographical boundaries, so long as the transaction is maritime in its nature. It is quick to redress unfair dealing or oppression. There is no distinction as to the persons who may invoke its aid. It is a very important part of modern commercial law, as it was originally of the old law merchant, and therefore is very practical and responsive to the demands of business; but it has also had the benefits of the accumulated wisdom of many progressive ages before this one, and is therefore cautious about untried innovations or thoughtless experiments. Its claim to the attention of mankind rests only on the inherent equity and justice of its rules and the celerity with which they may be applied to the solution of disputes, and without these characteristics it would have been long since absorbed into the common law of the land.

9. General Considerations.—The study of maritime law has the double attraction of historical and practical interest. It deals with the legal affairs of one of the most important phases of modern commercial activity and its problems are solved by precedents from a remote past. It is not a law which is confined within the narrow circle of the present or the limits of particular countries. It is ancient and international. At a time when this country is on the threshold of a revival of its merchant marine, and when there is also a general feeling that it is necessary to proceed to a constructive readjustment and restatement of our entire body of law, the law of the sea, which is really part

of the law merchant, must not be neglected. The present is imperfectly understood when the past is forgotten and it is difficult to appreciate any rule without considering its origin. Maritime law is not an exception. Its story presents all the attractions which incline the student to the study of history. It is profitable to follow here, as in politics, the development of ideas and customs, the efforts to accommodate the necessities of commerce by sea to those of the land, the methods of regulating the varied interests on shipboard and those between the shipowner and the ship's company, and the experiments towards ameliorating the age-long friction between the capitalist who supplied the ship and those who labored in her navigation. Through it all appears a constant search for justice, a sincere effort to accomplish what is right and fair for all concerned.

Here one may trace, for example, the rule of general average, the doctrine that what is sacrificed for the common benefit shall be compensated by a common contribution, a rule of such plain and simple equity that the failure of other codes to adopt it is a constant surprise. It appears in a fragment of Greek legislation and forms the text for a chapter in the Digest of Justinian. Its antecedents were probably Phœnician. It survived the Roman Empire in the traditions of seafaring men and reappears in the compilation of sea laws which Cœur-de-Lion revised on his return from the Holy Land, the Rolls or Judgments of Oléron. The Black Book of the admiralty preserves it in London. It may be traced through the Middle Ages down to the York-Antwerp Rules of 1890 and the practice of adjusters of the present day.

Or one may consider the treatment of employer's liability for injuries received in the course of the employment without his personal fault. Is vicarious liability the true test or the doctrine of fellow service? The merchants of the Mediterranean had the problem in the operations of a very large and extended commerce and the maritime law evolved the doctrine that justice requires that one injured in the service of the ship should be cured at the expense of the ship, and have his wages but no more. The last word on the real equity of this solution of a perplexing economic question remains to be said, perhaps, but the student can trace its development and application through many centuries down to the current decisions of our own Supreme Court.

On no other branch of law have tradition and custom exercised

a greater influence. It grew out of the necessities of navigation and commerce by sea and remains substantially uniform in spite of forms of government, racial habits and local innovations. In its essence, it is less susceptible of statutory modification than the common law and careless legislation has had only local effects, diverting business into other channels but ineffective to change the substance of the law. Maritime commerce is naturally free and the wisest commercial governments are those which regulate it least. Its freedom is a direct implication from the doctrine of the natural freedom of the seas. The extent to which governments may profitably regulate it without impairing its usefulness or diverting the current to other shores may be found in the history of this law. Underlying principles are the same whether ships move by sail or steam or electricity or are great or small. There have been large vessels before the twentieth century and an equivalent commerce. The law has remained the same. Men pay damages every day in some of our ports for overlooking rules that were current in Roman times and needless litigation is carried through appellate courts because of professional and judicial failures adequately to investigate the underlying principles of the maritime law.

The opportunities for the student are large and inviting. If this country is to do its part in the commerce of the future, its own maritime laws must be restated and reformed. This means not only the formal statutes and department regulations but also the great mass of judicial opinions of more than a hundred years. All are intertwined with each other and the result is chaotic. The fault has not been in the underlying principles of the maritime law but in legislation and interpretation. Our peculiar system has left the final word in the majority of decisions to judges trained in the common law and not professionally acquainted with any other. The result calls for the treatment which Justinian administered to the incongruous compilations, statutes and reports of his time. The student, either of business, history or law, who will apply himself to an investigation of the law of the sea and ascertain its simple fundamentals will not only have an interesting and profitable occupation but also be in a position to contribute substantially to the public welfare.

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CHAPTER II

TITLE AND TRANSFER

1. **How Title Acquired.**—Title to a ship is acquired in the same ways as other personal property, by construction, purchase, gift or exchange. It may pass by delivery, without any bill of sale or other written document. This method, however, is neither advisable nor practicable where the value is substantial or active business is contemplated.¹

2. **Registration and Regulation.**—The United States, like other commercial countries, provides a complete system for the registry and regulation of all ships entitled to the privileges of American vessels. These laws do not require registry or enrollment unless such privileges are desired. The owner may acquire and dispose of his boat without reference to them, but, until it is registered or enrolled, it is not a vessel of the United States and cannot engage in any trade.

It is therefore usual to have all matters in relation to the title and transfer of a ship in writing and according to customary forms. This is a safe and salutary rule.

3. **Shipbuilding Contracts.**—The builder of a ship is the first owner unless there is a special contract under which he merely performs labor upon materials which the other party supplies. This is unusual. The shipbuilder generally constructs the vessel upon an order or contract, which, if properly drawn, provides for

¹ Rev. St., § 4170, is as follows:

"Whenever any vessel, which has been registered, is, in whole or in part, sold or transferred to a citizen of the United States, or is altered in form or burden, by being lengthened or built upon, or from one denomination to another, by the mode or method of rigging or fitting, the vessel shall be registered anew, by her former name, according to the directions hereinbefore contained, otherwise she shall cease to be deemed a vessel of the United States. The former certificate of registry of such vessel shall be delivered up to the collector to whom application for such new registry is made, at the time that the same is made, to be by him transmitted to the Register of the Treasury who shall cause the same to be canceled. In every such case of sale or transfer there shall be some instrument of writing, in the nature of a bill of sale, which shall recite at length, the certificate; otherwise the vessel shall be incapable of being so registered anew."

This is discussed in § 10, *infra*, this chapter.

the time when the title shall pass away from him. Such contracts should be explicit in their details, especially as to the terms of payment and state of the title as the work goes on. Otherwise, the title may remain in the builder until delivery; if so, and the vessel be injured or destroyed, it will be his loss; or, if he becomes bankrupt before delivery, the vessel may be appropriated by his general creditors in spite of the fact that the purchase price may have been largely paid.

In the *United States v. Ansonia Co.*, 218 U. S. 452, a shipbuilder in Richmond, Va., became insolvent while engaged in constructing three vessels for the government; one war dredge for the War Department; one a revenue cutter for the Treasury Department; and the third a cruiser for the Navy. In each instance the shipbuilder was to furnish the labor and materials and perform the work and was to receive partial payments from time to time as the construction progressed. In the case of the dredge, the contract provided that the parts of the vessel as its construction progressed should become the sole property of the United States, although it was further provided that the government might subsequently reject defective work or parts and might even reject the completed vessel, should it fail to pass inspection. The contracts for the revenue cutter and cruiser, on the other hand, contained no provision for the passing of title before completion, but did provide that the government should have a superior lien upon the vessels for all payments made on account. The Supreme Court (Day, J.) said:

It is undoubtedly true that the mere facts that the vessel is to be paid for in installments as the work progresses, and to be built under the superintendence of a government inspector, who had the power to reject or approve the materials, will not of themselves work the transfer of the title of a vessel to be constructed, in advance of its completion. But it is equally well settled that if the contract is such as to clearly express the intention of the parties that the builder shall sell and the purchaser shall buy the ship before its completion, and at different stages of its progress, and this purpose is expressed in the words of the contract, it is binding and effectual in law to pass the title.

The court further held that the lien reserved in the contracts for the revenue cutter and cruiser was not superior to the liens of material men under the laws of Virginia.

4. Not Within Admiralty Jurisdiction.—Until the vessel is launched and completed she is not within the jurisdiction of the maritime law but, like any other piece of construction, is subject to the local laws of the State wherein the work is carried on. The Admiralty courts of the United States decline jurisdiction of all contracts for the building of a ship.

5. Enrollment and Registration.—When the ship is completed, she should be registered or enrolled as an American vessel. These words are synonymous; vessels in the foreign trade are “registered” and those in the domestic or coastwise trade are “enrolled”; (*The Mohawk*, 3 Wall. 566; *Huus v. Co.*, 182 U. S. 392, 395). Vessels of less than twenty tons and more than five tons are neither registered or enrolled but should be licensed.

6. Ships Entitled to.—This proceeding is accomplished at the office of the collector of customs of the district in which the home port of the vessel may be (*Rev. St. §4141, Morgan v. Parham*, 16 Wall. 471). The home port is the port at or nearest which the owner, or managing owner, resides. The registration, enrollment and licensing of vessels is fully covered by Regulations originally promulgated by the Secretary of the Treasury under the navigation laws of the United States, which may now be obtained in revised form by application to the Department of Commerce at Washington.

Ships entitled to such registration or enrollment are:

1. Vessels built in the United States and owned by a citizen.
2. Vessels captured in war and condemned as prize, and owned by a citizen.
3. Vessels forfeited and sold for breach of the laws of the United States and purchased and owned by a citizen.
4. Seagoing vessels whether steam or sail which have been certified by the Steamboat Inspection Service as safe to carry dry and perishable cargo, *wherever built*, which are to engage only in trade with foreign countries, being wholly owned by citizens of the United States or corporations organized and chartered therein, the president and managing directors and the holders of the control of which shall be citizens of the United States; also vessels answering the foregoing description which are to trade with the Islands of Guam and Tutuila until February 1, 1922, and thereafter as governed by Sec. 21 of the Merchant Marine Act (see Appendix).
5. Vessels wrecked in the United States, and purchased and repaired by a citizen, if the cost of the repairs is equal to three times the appraised value of the wreck as salvaged.

6. Vessels of the United States Shipping Board sold to a citizen of the United States.

7. Steamboats employed in a river and bay of the United States and owned wholly or in part by an alien resident within the United States.

8. Yachts owned by citizens and employed exclusively for pleasure. These, although foreign built, may be licensed to proceed from one domestic port to another so long as they do not trade or carry passengers.

7. Incidents of Enrollment or Registration.—The law provides that vessels registered pursuant to law and no others (except those qualified according to law for carrying on the coasting or fishing trade) shall be deemed vessels of the United States and entitled to the benefits and privileges pertaining to such vessels. When a vessel ceases to be wholly owned by citizens of the United States or a corporation created under the laws of the United States, control of which is held by citizens, or ceases to be commanded by a citizen of the United States, she forfeits her rights, benefits and privileges of a vessel of the United States. Pilots and officers having charge of a watch must be citizens of the United States.

A capital distinction to be borne in mind is that between vessels entitled to engage in coastwise trade and those not so entitled. No vessel of foreign registry may engage in that trade. No foreign-built vessel of American registry, with certain exceptions,² may engage in that trade under penalty of a fine, although it is within the power of the Secretary of Commerce to waive the imposition of such fine, and this has sometimes been done where an emergency arising out of exceptional circumstances has made it necessary for an unauthorized vessel to trade between ports of the United States. Vessels entitled to engage in the coastwise trade are those which, being built within and owned by citizens of the United States, are enrolled for that trade. Vessels owned by corporations may not engage in the coasting trade unless 75 per cent. of the interest therein is owned by citizens.

The coasting trade consists of trade between continental ports of the United States, either directly or by way of a foreign port; that is to say, if you depart from New York with merchandise

² The exceptions are foreign-built vessels purchased from the United States Shipping Board and foreign-built wrecks repaired in the United States as indicated in § 6, *supra*, this chapter. Also all foreign-built vessels admitted to American Registry, owned on February 1, 1920, by citizens so long as they continue to be so owned.

for Miami, you are trading between American ports, even though you may touch at Bermuda *en route*. The test is whether you trade between ports of the United States as part of a single voyage, irrespective of nationality of the ship. The character of the voyage, whether foreign or domestic, is determined by its terminus (*Tabor v. U. S.*, 1 Story 1). Thus a vessel bound from New York to Yokohama, via San Francisco, would be upon a foreign voyage. Such a vessel, flying a foreign flag, could not discharge any of her passengers or cargo at San Francisco.

Trade between the east and west coasts via the Panama Canal or Cape Horn is coastwise. Trade between ports of the United States and those of Hawaii, Porto Rico and Alaska is coasting trade, though the Shipping Board may issue permits to foreign vessels to carry passengers between Hawaii and the Pacific coast until February 1, 1922. Trade between ports of the United States and those of the Philippine Islands is by statute not coasting until February 1, 1922. Thereafter it is governed by Sec. 21 of the Merchant Marine Act, which will be found in the Appendix. Trade between ports of the United States and those of the Panama Canal Zone is not coasting.

By the coasting trade is not meant the mere putting in of a vessel at a port of the United States after leaving another port for bunkers or supplies (which is not forbidden) but trading between such ports, *e. g.*, the carriage of cargo and passengers from one such port and their discharge at another.

8. *How Obtained.*—This registration or enrollment is obtained by proof of the collector that the vessel was built within the United States, or otherwise meets conditions mentioned; and that no foreigner is interested in her (*Rev. St. §4142*); her size, characteristics and other points of identification are shown by certificates of the master carpenter under whose direction she was built, and surveyors appointed for the purpose, in accordance with R. S. 4147-4153; security is given that the certificate obtained shall be solely used for the ship, and thereupon the collector issues in statutory form his certificate of registration or enrollment, as the case may be (*Rev. St. §§4155, 4319*).

The title to the ship may vest in one or more individuals or a corporation. In either case the residence or domicile of the owner is important. The law considers that for purposes of jurisdiction

the ship is a part of the territory of the state or country in which the owner resides, and she continues for many purposes to be subject to its laws wherever she sails (*Crapo v. Kelly*, 16 Wall. 610; *The Hamilton*, 207 U. S. 398).^a In the case of *Crapo v. Kelly*, just cited, the ship *Arctic*, registered at Fairhaven, Massachusetts, belonged to a firm of owners, residing and doing business in that state, who had become insolvent. The insolvent court of Massachusetts undertook to include the vessel among the assets of the owners within its jurisdiction, for the benefit of creditors. The vessel arrived at New York and was attached by a creditor of the owners residing there. Upon extended consideration, the Supreme Court held:

This vessel, the *Arctic*, was upon the high seas at the time of the assignment (for the benefit of creditors). The status at that time decides the question of jurisdiction. . . . We hold that she was subject to the disposition made by the laws of Massachusetts and that for the purpose and to the extent that title passed to the assignees, the vessel remained a portion of the territory of that state.

The ship's registry or enrollment, therefore, fixes her home port and she will be considered as belonging to the state in which such port is located and as foreign to all other states and countries. Ordinarily she is liable to taxation as personal property only in the state in which her home port is situated, but this is subject to the qualification that her situs as personal property is, for purposes of taxation, governed by the same rules applicable to other personal effects. The general rule is that the situs of personal property is the domicile of the owner, and a ship will be liable to taxation in the state where the owner resides, irrespective of the location of her home port as shown on the ship's documents. Thus in *So. Pac. Co. v. Ky.*, 222 U. S. 63, a corporation organized in Kentucky, owned a number of vessels enrolled at New York. They were held taxable in Kentucky.

The law further requires that every change in the title, com-

^a While a vessel is part of the territory of her home jurisdiction for jurisdictional purposes, the doctrine of her territoriality does not extend to treating her as part of the soil for all purposes. Thus the Supreme Court has held that foreign seamen brought to the United States to work on an American ship engaged in foreign commerce, were not engaged "to perform labor within the United States" within the meaning of the contract labor law. (*Scharrenberg v. Dollar S. S. Co.*, 245 U. S. 122.)

mand or structure of the ship shall be promptly reported and placed for record in the Collector's office, so that at any time her present status, the name of her commander and entire past history may be fully shown upon its books, and the Collector will furnish on request an abstract of the title which his records disclose. This abstract, of course, becomes important whenever the ship is sold or used as security, although it will not show anything in regard to maritime liens upon it since these are, in their nature, secret.

Under present practice the owners of a ship usually incorporate. Such corporations take the complete title and are treated as the sole owner in all respects. There is nothing in the admiralty law which differentiates corporations from other owners. It is also popular to incorporate as "single ship companies" and in this way a double protection against liabilities in excess of the amount invested may be obtained.

9. Recording of American-built Foreign Ships.—Vessels of foreign ownership built in the United States may be measured and recorded in the office of the Collector for the district in which they are built and a certificate of record issued. The advantage of having this is in having the official record already made in case the vessel subsequently becomes the property of citizens and entitled to registry. Changes of name and master of recorded vessels must be endorsed on the certificate of record and reported to the Collector at the port of record (Rev. St. §§4180-4184).

10. Name.—A new vessel is registered under the name selected by her owners and must continue to bear that name—which is required to be painted upon her bows, stern, pilot house and life-boats in letters of specified size,—unless permitted to change it. By Act of Congress approved February 19, 1920, changes of name may be made by the Commissioner of Navigation, United States Department of Commerce, "when in his judgment there shall be sufficient cause for so doing." Before authorizing a change of name, the Commissioner requires "such evidence as to age, condition, where built, and pecuniary liability of the vessel as may be deemed necessary to prevent injury to public or private interests," including the interests of the vessel's creditors. The purpose of these requirements is to prevent imposition upon the public by masquerading old, worn-out vessels under new names, and to prevent the loss of a vessel's identity, in fraud of her creditors, by changing her name.

11. Sale.—The sale of a ship is usually evidenced by a bill of sale on a government form which will be furnished by the collectors. It is essential that it should include a copy of the last registry or enrollment and licenses, executed in the presence of two witnesses and acknowledged before a notary public. Mortgages may be made upon similar forms and the statute provides that, "No sale, conveyance, or mortgage which, at the time such sale, conveyance, or mortgage is made, includes a vessel of the United States, or any portion thereof, as the whole or any part of the property sold, conveyed, or mortgaged shall be valid, in respect to such vessel, against any person other than the grantor or mortgagor, his heir or devisee, and a person having actual notice thereof, until such bill of sale, conveyance, or mortgage is recorded in the office of the collector of customs of the port of documentation of such vessel." (Ship Mortgage Act, 1920, Subsection C (a). See Appendix, Merchant Marine Act, 1920, §30.) While a prudent man will invariably evidence the sale of a ship by a written instrument, this is not essential to the validity of the sale, if the common law essentials to a sale of personal property—delivery or payment, in whole or in part, or both,—are present. The requirement of the statute (Rev. St. §4170; Ship Mortgage Act 1920, Subsection H; See Merchant Marine Act 1920, §30) that a bill of sale be given, containing a copy of the registry or enrollment, and recorded in the Collector's Office, is for the purpose of giving notice to the world of the transfer. Without these formalities, the sale is valid as against the grantor and persons having actual notice only; not as against any other persons claiming an interest in the ship. If an American vessel be sold to an alien without obtaining the Shipping Board's approval and without recording the transfer, the vessel is liable for forfeiture.

12. Transfer of Flag and Sales to Foreigners.—The Merchant Marine Act of June 5, 1920 (see Appendix), provides that no American vessel shall be sold or transferred to any one not a citizen or placed under foreign registry without obtaining the approval of the Shipping Board. Any vessel transferred in violation of this provision is subject to forfeiture and fine. An American vessel may not be sold by order of a district court of the United States in a suit *in rem* in admiralty to any person not an American citizen.

13. Admiralty Sales.—The title to the ship may also be transferred by a sale in admiralty. This passes a new and complete title to the purchaser and absolutely frees the ship from all existing liens, titles or encumbrances. Such a sale is only made in the course of a suit in admiralty against the ship for the enforcement of a maritime lien, or other matter within the jurisdiction of the court. A ship which passes through such a sale becomes in effect an absolutely new vessel so far as prior title or encumbrances are concerned, and all previous claims are relegated to the proceeds in the registry of the court (*The Garland*, 16 Fed. 283). The Ship Mortgage Act, 1920 (§30 Merchant Marine Act, Subsection O), which creates preferences in favor of certain mortgages, provides that, on the sale in admiralty of a ship upon which there has existed a preferred mortgage the court shall, on request of an interested party, require the purchaser at the judicial sale to give a new mortgage on terms similar to the old one and, if such new mortgage is given, the mortgagee shall not be paid from the proceeds of the sale and the amount of the purchase price shall be diminished by the amount of the new mortgage. It is essential that the court should have full and complete jurisdiction to make the sale. Such sales are made by the marshal under a writ issued in a pending suit in admiralty; neither the officer nor the court warrants anything and the title given depends wholly upon the regularity of the proceedings and the jurisdiction of the court. The essentials are simple and it is easy to ascertain if they have been complied with. For example, when the marshal seizes a ship under admiralty process, he is required to give public notice of the seizure and the return-day of the writ in order that all the world may be bound by the proceeding. This is accomplished by taking actual possession of the vessel, posting a copy of the writ in some conspicuous place, and publishing an appropriate notice in some newspaper within the district. Sometimes this publication is omitted or deferred to a later stage of the proceedings. In *Gould v. Jacobson*, 58 Mich. 288, the results of such an omission were fatal to the title of the purchaser at a marshal's sale of the *Pickwick*. The ship had been seized in admiralty and sold to pay her debts. The marshal had failed to publish notice of the seizure; the Court held that the sale was quite void and that replevin would lie in favor of the representatives of the original owner against the marshal's vendee.

14. Sales by Trustees and Executors.— These will only transfer the title of the true owner if the conditions of the trust or power given by the will are strictly observed. The rules are no different than in sale of other personal property and create no further exemption from maritime liens or other encumbrances than sales by ordinary owners. The warranty is usually less sweeping.

15. Sales by Mortgagee.— Foreclosures of vessel's mortgages are frequently by virtue of the power of sale contained in the instrument and, if that power is carefully observed, will convey all the title of the mortgagor.

Until the enactment of the Ship Mortgage Act of 1920, these proceedings were outside of admiralty jurisdiction. That act made substantial changes, not only in the status of mortgages of American ships, but in the manner of enforcing them. It is discussed under the title "Mortgage" *infra* and is printed in full in the Appendix (Merchant Marine Act 1920, §30).

16. Sales by Master.— In case of actual necessity the master may sell the ship and convey a good title to the purchaser, free of all liens. Such sales become necessities within the meaning of the maritime law, where the master cannot communicate with the owner and there is nothing better that can be done for him or the others concerned in the adventure. If the master has an honest purpose to serve those who are interested in the ship and can clearly prove that the situation required the sale, he will be entirely justified and the purchaser's title secure. Good faith and necessity must concur. If, within a reasonable time, the master can consult with the owner, he should do so, because, if possible, the owner's judgment must control; and, in any event, the master should not sell without the advice of competent persons on the spot, whose opinions should be taken as to whether it is better judgment to repair or sell. His authority does not depend on their recommendation, but if he acts on it, his justification will be the more secure. Where possible, the facts should be presented by a survey of the ship and the surveyors' report give in detail the steps they take and their conclusions, with the facts necessary to vindicate them. When a vessel is lawfully sold by the master all existing liens are divested and an absolute title passes. The liens attach to the proceeds, however, which become, in the view of the maritime law, the substitute for the ship. A good title will pass by such a sale even if no bill-of-sale is ex-

ecuted. A parole sale—that is to say, a sale by word of mouth, without bill of sale or other writing—and delivery will effectually pass the property; while formal documents are, of course, desirable they are not essential to its validity.

The principles governing the sale of a vessel by her master are set forth very clearly by Mr. Justice Davis, in delivering the opinion of the Supreme Court in the case of the *Amelie*, 6 Wall. 18: The *Amelie* on her voyage from Surinam to Boston encountered perils of the sea, and was obliged to seek the harbor of Port au Prince, Hayti, and was sold there at public auction by the master, and purchased by Reviere, the claimant. The owner of the cargo, because of its non-delivery, filed a libel and insisted that the sale of the vessel was not justifiable and passed no title to Reviere, the claimant; and even if the sale was proper under the circumstances, that Reviere took title subject to all existing liens.

The sale of a ship becomes a necessity within the meaning of the commercial law, when nothing better can be done for the owner, or those concerned in the adventure. . . . In order to justify the sale, good faith in making it and the necessity for it must both concur, and the purchaser to protect his title must be able to show their concurrence. The question is not whether it is expedient to break up a voyage and sell the ship, but whether there was a legal necessity to do it. If this can be shown, the master is justified; otherwise not. And this necessity is a question of fact, to be determined in each case by the circumstances in which the master is placed, and the perils to which the property is exposed.

If the master can within a reasonable time consult the owners, he is required to do it, because they should have an opportunity to decide whether in their judgment a sale is necessary.

At this point it may be observed that modern means of communication by cable and wireless render consultation with the owner feasible in many instances where it was not formerly possible, and there can be no doubt that it is the master's duty to avail himself of these means before selling the vessel. The court proceeds:

He should never sell, when in port with a disabled ship without first calling to his aid disinterested persons of skill and experience, who are competent to advise, after full survey of the vessel and her injuries, whether she had better be repaired or sold. And although his authority to sell does not depend on their recommendation, yet, if they advise a sale, and he acts on their advice, he is in a condition

to furnish the court or jury reviewing the proceedings strong evidence in justification of his conduct.

In this case the ship was surveyed by competent surveyors, who made a full report and advised that the vessel be sold as the cost of repairs would exceed her value. The court continued:

After this advice, the master who was bound to look to the interest of all parties concerned in the venture, had no alternative but to sell. In the face of it, had he proceeded to repair his vessel, he would have been culpable. Being in a distant port, with a disabled vessel, seeking a solution of the difficulties surrounding him; at a great distance from his owners, with no direct means of communicating with them; and having good reason to believe the copper of his vessel was displaced, and that worms would work her destruction, what course so proper to pursue as to obtain the advice "of that body of men who by the usage of trade have been immemorially resorted to on such occasions?" (*Gordon v. Mass. Ins. Co.*, 2 Pick. 264). No prudent man, under the circumstances, would have failed to follow their advice, and the state of things, as proved in this case, imposed on the master a moral necessity to sell his vessel and reship his cargo.

It is insisted, even if the circumstances were such as to justify the sale and pass a valid title to the vendee, he, nevertheless, took the title subject to all existing liens. If this position were sound, it would materially affect the interests of commerce, for, as exigencies are constantly arising, requiring the master to terminate the voyage as hopeless, and sell the property in his charge for the highest price he can get, would any man of common prudence buy a ship sold under such circumstances, if he took the title encumbered with secret liens, about which, in the great majority of cases, he could not have the opportunity of learning anything? The ground on which the right to sell rests is, that in case of disaster, the master, from necessity, becomes the agent of all parties in interest and is bound to do the best for them that he can, in the condition in which he is placed and, therefore, has the power to dispose of the property for their benefit. When nothing better can be done for the interests of those concerned in the property than to sell, it is a case of necessity, and as the master acts for all, he sells as well for the lien holder as the owner. The very object of the sale, according to the uniform current of the decisions, is to save something for the benefit of all concerned; and if this is so, the proceeds of the ship, necessarily, by operation of law, stand in place of the ship. If the ship can only be sold in case of necessity, where the good faith of the master is unquestioned, and if it be the purpose of the sale to save something for the parties in interest, does not sound policy require a clean title to be given the purchaser in order that the property may bring its full value? If the sale is impeached, the law imposes on the purchaser the burden

of showing the necessity for it, and this he is in a position to do, because the facts which constitute the legal necessity are within his reach; but he cannot know, or be expected to know, in the exercise of reasonable diligence, the nature and extent of the liens that have attached to the vessel. Without pursuing the subject further, we are clearly of the opinion, when the ship is lawfully sold, the purchaser takes an absolute title divested of all liens, and that the liens are transferred to the proceeds of the ship, which in the case of the admiralty law becomes the substitute for the ship.

The sale in this case was made by parole; the master delivered the vessel to the purchaser, without, so far as appeared, executing any document evidencing the sale. On this subject, the court said:

The title of *Reviere*, the claimant, was questioned at the bar, because he did not prove the master executed to him a bill of sale of the vessel. We do not clearly see how this question is presented in the record, for there is no proof, either way, on the subject, but if it is, it is easily answered. A bill of sale is not necessary to transfer the title to the vessel. After it was sold and delivered, the property was changed and no written instrument was needed to give effect to the title. The rule of common law on this subject has not been altered by statute. The law of the United States which requires the register to be inserted in the bill of sale on every transfer of a vessel, applies only to the character and privileges of the vessel as an American ship. It has no application to this vessel in this case.

Sales of vessels by their masters are less common now than formerly in view of the modern facilities for communication with owners. If such sales are subject to the restrictions of the recent acts of Congress, heretofore mentioned, it would appear to be practically impossible for a master to sell an American ship to a foreigner. Whether such sales, arising as they do, *ex necessitate*, under the general principles of maritime law, are to be regarded as outside of the provisions of these statutes, has not been decided. There is no reason to suppose that the requirements of the statutes are suspended in such cases.

17. Sale of Ship at Sea.—Such vessels may be sold or mortgaged by delivery of a proper instrument without the actual presence of the property and are entirely valid if possession be taken within a reasonable time after it comes within the purchaser's reach. The new owner should record the title in the custom house for the district in which his residence is, and observe all the requirements of law in regard to a new registration if he desires

to preserve her national character. To be safe, until the vessel returns, the mortgage of a ship at sea should be recorded at the home port, as shown by the outstanding document as well as at the new home port.

In the case of a transfer of a vessel at sea, where it is desired to preserve her nationality, it is necessary, upon her arrival at her home port, to deliver up her certificate of registration and obtain a new certificate.

In the case of *United States v. Willings*, 4 Cranch, 48, a share in an American vessel was transferred by parole while she was at sea; and, before she reached port, was re-transferred, also by parole, to the original owners. The government challenged her right to the American flag, but the court held that the requirement that, upon transfer, the certificate of registry be surrendered, did not mean that the ship would forfeit the flag unless such surrender were contemporaneous with the sale, since a sale may be made by parole, and, inasmuch as the ship carries her papers with her, the registration could not be attended to until she returned. The Court, speaking through Chief Justice Marshall, held that the ship, having been sold at sea by parole and bought back by her original owners, also, by parole, before she reached port, had been twice legitimately sold and as her ownership when she returned was the same as when she started, her nationality remained unchanged.

18. Appurtenances.—A bill of sale or mortgage of the ship should describe the interest conveyed, either the whole or a fractional part, and include the appurtenances. These are covered by the usual phrase, "engines, boilers, machinery, masts, bowsprit, sails, boats, anchors, cables, and all other necessities thereunto appertaining and belonging." Whatever is on board for the object of the voyage and belonging to the owners will ordinarily be included, like provisions, supplies, compasses, chronometers as well as new articles purchased for the ship but not yet installed on board. As in other cases of sales, the intention of the parties, so far as it can be ascertained, will control and it is desirable to have an inventory of separate articles in order to avoid misunderstandings or disputes.

19. Warranties and Representations.—The law is the same as in other cases of sales. The buyer must take care. The seller must not deceive. Material representations made to effect the sale are equivalent to warranties. If the ship is built or sold for

a particular purpose, there is an implied warranty of fitness for that purpose. If the contract is reduced to writing, the parole evidence rule will control as to prior stipulations.

REFERENCES FOR GENERAL READING

- Shipping and Admiralty*, Parsons, Vol. I, Chapter III.
Commentaries, Kent, III, Lecture XLV.
Sales, Benjamin (2d Am. ed.), §§ 336-339.
White's Bank v. Smith, 7 Wall. 646.
Fleming v. Fire Assoc., 147 Mich. 404.
U. S. v. Forester, Newb. Adm. 81.
John Jay, 17 How. 399.
Admiralty, Benedict, § 158.
Huus v. S. S. Co., 182 U. S. 392.

CHAPTER III

OWNERS AND MANAGERS

1. Who May Be.—The owner of an American vessel must be a citizen of the United States. The statutes provide that "Vessels registered pursuant to law and no others, except such as shall be duly qualified according to law for carrying on the coasting or fishing trade, shall be deemed vessels of the United States, and entitled to the benefits and privileges appertaining to such vessels; but no such vessel shall enjoy such benefits and privileges longer than it shall continue to be wholly owned by a citizen or citizens of the United States or a corporation created under the laws of any of the States thereof, and be commanded by a citizen of the United States" (7 Comp St., 1916 §7707). Ownership may be shown by possession, under claim of title, as in the case of other personal property, but the best evidence is the formal bill of sale, possession, and a clean abstract of title from the records of the Collector of Customs of her home port. All persons born or naturalized in the United States, and subject to its jurisdiction, are citizens of the United States and of the state wherein they reside. Thus minors, married women (except those having alien husbands), persons under guardianship, trustees, and corporations, like other citizens, may be owners.

2. Part-Owners.—The ship may be owned in shares by any number of individuals. Such part-owners do not become partners by reason of such ownership. Each has a separate and distinct interest which he may sell or dispose of without the consent of the others. They are not partners in the absence of a special agreement to that effect. Each is liable for only his own proportion of the debts and none is responsible for the acts of the others beyond the amount of his interest in the ship, unless he has himself created such further liability directly or by reasonable implication.

Generally speaking, the part-owners of a ship occupy the legal status of tenants in common. They may, of course, become part-

ners and subject to the legal incidents of partnership. If they so agree, or if they act in such a manner, they assume the attributes of partnership, one of the chief of which is the liability of each individual partner for the entire indebtedness of the firm (The Wm. Bagaley, 5 Wall. 377).

The Daniel Kaine, 35 Fed. 785, was a contest over the surplus remaining in the registry of the court from the sale of a tow-boat. This had been allotted to the several part-owners in proportion to their shares, but the master, who was one of the owners, claimed a lien against the entire fund for advances made by him on the theory that the owners held the vessel in partnership and not merely as individual coöwners. The Court said:

The burden of proof is upon Captain Cowan to establish the allegation contained in his petition, but which is denied in the answer thereto, that the shareholders in the Daniel Kaine were not tenants in common but partners in respect to the ownership of the vessel. Has he succeeded in this? The evidence bearing upon this point is as follows: The boat was built by James Lynn, George T. Miller, and R. W. Cowan, who from the first held her in defined shares,—Lynn and Miller each owning seven-eighteenths and Cowan owning four-eighteenths. Thus was the boat enrolled on February 8, 1882. Speaking of her enrollment, Captain Cowan testifies: "There was no other agreement among us than that the boat should be as set out in the registry." In April, 1886, George T. Miller transferred his seven-eighteenths in the boat to George B. Kaine. Captain Cowan further states that there was no written agreement between the owners of the boat as to how she was to be operated, nor any verbal agreement that she was to be run or operated in partnership. However, it seems that, by the tacit consent of all the owners, she was run on joint account. Her employment was in the towing of coal, and at first she was principally engaged in towing for two coal firms, in one of which Lynn was a member, and in the other Miller, viz., James Lynn & Sons, and George T. Miller, & Co. The bookkeeper who kept the books of the boat made out and furnished annually to the several owners balance sheets, in which the cost of the boat appeared as an item. Do these facts establish that the shareholders in the Daniel Kaine were partners in her ownership? I think not. That the cost of the boat appeared in the balance sheets which the bookkeeper made out is not a controlling circumstance, and, indeed, is a matter of little moment, when considered in connection with Captain Cowan's testimony, above quoted. According to the enrollment of the boat, her part owners were tenants in common, and there was no different or other agreement as to ownership. An agreement to run a ship on shares does not make the owners part-

ners with respect to the vessel. Says Chief Justice Gibson in *Hopkins v. Forsyth*, 14 Pa. St. 38:

"Carriers may doubtless become partners, but not merely by becoming joint owners of a chattel, and using it for a common purpose. And the principle is peculiarly applicable to ships or other craft, the exceptions to it in respect to them being always founded in very special circumstances."

Now, where the vessel is not partnership property, according to the clear weight of authority in this country, one part owner has no lien for his advances and disbursements upon the share of his co-owner. Nor does it make any difference that the part owner making such advances was also the ship's husband. In treating of this subject, Mr. Justice Curtis, in the case of the *Larch*, 2 Curt. 434, State, after remarking that in England the law is now settled against the existence of the lien, said:

"There has been some diversity of decision in this country, but I think it has proceeded from diversity in the views taken of the particular facts of the cases, rather than from any real difference in principles. That the owners of a vessel may be copartners in respect to that, as well as any other property, and that, when they are so, each has a lien, can not be doubted. But where no such special relation exists, where they are merely part owners, and as such tenants in common, that one has no lien on the share of another for advances, I believe to be equally clear."

3. Corporations.—Corporations organized under state laws may be the owners of American vessels. A corporation is a legal person having an individuality distinct from all its stockholders. It is the corporation, and not the stockholders, who owns the corporation property. For that reason the Attorney General has expressed the opinion (29 Op. 188) in a case in which a vessel was owned by a corporation of the State of New York, a majority of whose stock was held by aliens and whose directors were all aliens, except three, that, under the laws, so long as the corporation was legally organized and existing as an American corporation under the laws of New York, a vessel owned by it was entitled to American registry.

It is unlawful, without obtaining permission of the Shipping Board, to place under foreign registry, a vessel owned wholly or in part by an American corporation or to transfer such vessel to any person other than a citizen (Merchant Marine Act, 1920. See Appendix), and within the meaning of that act no corporation is deemed a citizen unless the stock control and management

are vested in individual Americans. To enable a corporate-owned vessel to engage in the coasting trade, 75 per cent of the interest in the corporation must be American owned.

4. Majority Interest.— The majority interest will usually control, whether the title is in a corporation or individuals. Thus the majority may direct or change the employment of the vessel, pledge her for supplies or repairs, and employ or dismiss the master and crew. If the master be also a part-owner, the majority still has the right to remove him, unless there is a valid written agreement to the contrary. In the *Orleans v. Phœbus*, 11 Peters, (U. S.) 175, it appeared that Phœbus was master and owner of one-sixth of the steamboat *Orleans*. He alleged that he had been dispossessed by the owners of the other five sixths, who were operating the vessel against his wishes. Speaking for the Supreme Court, Justice Story said:

The majority of the owners have a right to employ the ship in such voyages as they may please; giving a stipulation to the dissenting owners for the safe return of the ship, if the latter, upon a proper libel filed in the admiralty, require it. And the minority of the owners may employ the ship in the like manner, if the majority decline to employ her at all.

Similarly Justice Clifford, in *The Wm. Bagaley*, 5 Wall. 377:

Even where the part owners of a ship are tenants in common, the majority in interest appoint the master and control the ship, unless they have surrendered that right by agreeing in the choice of the ship's husband as managing owner.

If the owner be a corporation, the control of the vessel is usually directed by the Board of Directors, as in the case of other corporate enterprises, though the holders of a majority of the capital stock may determine the disposition of the vessel and all matters relating to her, by voting their stock at regular or special stockholders' meetings, called in accordance with the company's charter and by-laws and the laws of the state in which the company is incorporated.

5. Minority Interest.— The minority interest, where the majority sends out the ship against its wishes, may compel the majority to give a bond for its safe return or the payment of the value of its interest. This may be obtained through a court of admiralty. When such security is given the dissenting owners, they are not

entitled to compensation for the use of their shares or to any portion of the profits. In the same way, a minority, desiring to use the ship against the majority who prefer to lay her up, may obtain her. The rule was thus laid down by Justice Clifford in *The Wm. Bagaley*, 5 Wall. 377, heretofore cited :

Admiralty, however, in certain cases, if no ship's husband has been appointed, will interfere to prevent the majority from employing the ship against the will of the minority without first entering into a stipulation to bring back the ship or pay the value of their shares. But the dissenting owners in such a case, bear no part of the expenses of the voyage objected to, and are entitled to no part of the profits. . . . Unless the coowners agree in the choice of a managing owner or the dissenting minority go into admiralty, the majority in interest control the employment of the ship and appoint the master.

The admiralty practice is governed by the old maxim that "ships were made to plow the ocean, and not to rot by the wall." So, if the owners be evenly divided in opinion, the party desiring to employ the ship will prevail, on giving security to the other. In *Willings v. Blight*, 2 Pet. Adm. 288; 30 Fed. Cas. No. 17765, decided by the United States District Court for the Eastern District of Pennsylvania in 1800, the court quaintly expressed the law as follows :

It is a principle discernible in all maritime codes, that every encouragement and assistance should be afforded to those who are ready to give their ships constant employment; and this not only for the particular profit of owners, but for the general interests and prosperity of commerce. If agriculture be, according to the happy allusion of the great Sully, "one of the breasts from which the State must draw its nourishment," commerce is certainly the other. The earth, parent of both, is the immediate foundation and support of the one, and ships are the moving powers, instruments and facilities of the other. Both must be rendered productive by industry and ingenuity. The interests and comforts of the community will droop and finally perish if either be permitted to remain entirely at rest. The former will less ruinously bear neglect, and throw up spontaneous products; but the latter require unremitted employment, attention and enterprise, to insure utility and product. A privation of freight, the fruit of the crop of shipping, seems therefore to be an appropriate mulct on indolent, perverse or negligent part owners. The drones ought not to share in the stores acquired and accumulated by the labor, activity, foresight and management of the bees. Although the hive may be common property, it is destructively useless to all, if not furnished with means of profit and support by industry and

exertion; which should be jointly applied by all before they participate in beneficial results. Nor should the idle and incompetent be permitted to hold it vacant and useless to the injury and ruin of the industrious and active.

6. Suits between Part-Owners.—The admiralty will sometimes entertain a suit for partition between owners who can not agree and sell the ship for the purpose of dividing the proceeds. Generally it will only recognize legal titles, that is, those shown by bills of sale or matters of record, and not merely equitable claims of ownership. Part-owners have no lien against each other where one has paid more than his share of the debts or expenses and therefore can not proceed against the ship directly. They can, however, have an accounting in equity on other proceeding in state courts for the purpose of adjusting the matter. One may sue the other for the loss of the vessel by negligence. A part-owner may have a lien upon the ship for wages or other maritime services, subordinate, however, to the liens of strangers to the title. Each is bound to pay to the others his own share of the expenses of the ship and, in the absence of an express agreement to the contrary, the law will imply a promise to repay an excess advanced by one over his share on which an ordinary action may be brought (*Sheehan v. Dalrymple*, 19 Mich. 239).

7. Authority of Owner.—As between the owner and the master, the former is supreme. The relation is one of agency or employment and the master must obey. The owner has the legal right to take his ship from the custody and control of the master, at any time, and in whatever place. He may remove him at pleasure, and without assigning any cause, subject only to the ordinary responsibility for breach of contract if a contract be broken. This is because the owner is very deeply concerned in who is master of his ship and is so highly chargeable with his conduct that it is deemed proper that he should be permitted to dismiss him at any time. The relation is a confidential one and can not be forced to continue when confidence ceases.

8. Obligation of Owner.—The owner is bound to provide a seaworthy ship. While the maritime law, in order to encourage investments of capital, endeavors to provide certain limitations of liability, the obligation of seaworthiness is supreme up to, at least, the amount invested in the ship. Subject only to a possible limitation of liability, the owner is absolutely bound to furnish and

maintain a seaworthy ship; this obligation is analogous to that of an employer on land to furnish a safe place for his employees or of a carrier to furnish safe and roadworthy means of transport.

Seaworthiness is a relative term. The ship must be fit in design, structure, condition and equipment to encounter the ordinary perils of the voyage. She must have a competent master and a sufficient crew. Absolute perfection, of course, is not required; the real test is that the ship shall have that degree of fitness which the ordinary careful and prudent owner requires of his vessel at the commencement of the voyage in view of all the circumstances which may attend it.

The law does not insist that the shipowner shall in person attend to all his duties in respect of the ship. It recognizes that most of these must be met by agents. It contemplates that shipowners may avail themselves of the facilities common to business men and be relieved whenever they have properly employed competent agents to supervise the ship at sea and in port. In most instances where the maritime law may be applied the owner will not be responsible beyond his interest in the ship, for the acts or omissions of agents whom he has selected with due care.

9. Liability of Owner.—The owner is liable for all the contracts and negligence of the master up to, at least, the value of his interest in the ship. In most cases, he may limit his liability to such value by abandoning the ship to the creditors. This is an underlying doctrine of the general maritime law and generally carried forward into the statutes of all maritime countries. There is a general exception, however, in regard to sailors' wages. The owner remains absolutely liable for these and cannot limit against them. He is also liable for all his personal contracts in regard to the ship as well as for his personal negligence. He will not be liable for the contracts or torts of the master outside of the scope of his employment, as on a bill-of-lading for cargo never received on board or an unauthorized assault on a passenger.

An illustration of the liability of the owner for contract of the master within the scope of his employment is to be found in a case in which the master contracted for extra pilotage. As the United States District Court remarked in the *Cervantes*, 135 Fed. 573, "In pilotage cases resort may be had to the vessel or the owner or the master."

The case of *Chamberlain v. Ward*, 21 How. 548, illustrates

the liability of an owner for the tort of the master. It grew out of a collision in Lake Erie and was an action in admiralty brought *in personam* by the owners of one of the vessels against the owners of the other for damages, alleging the negligent operation of the respondents' vessel. The Supreme Court (Clifford, J.) held:

Owners of vessels, and especially those who own and employ steamships, whether propellers or sidewheel steamers, must see to it that the master and other officers intrusted with their control and management are skillful and competent to the discharge of their duties, as, in case of a disaster like the present, *both the owners and the vessels* are responsible for their acts, and must answer for the consequence of their want of skill and negligence; and this remark is just as applicable to the under officers, whether mate or second mate, as to the master; during all the time they have charge of the deck. That the mate in this case was substantially without experience in navigating steamers, and utterly destitute of the requisite information to fit him to determine the proper courses of the voyage, are facts so fully proved that it is difficult to regard them as the proper subjects for dispute; and what is more, the master knew his unfitness when he started on the voyage, and stated before the vessel left Cleveland, to the effect that he was afraid he was going to be sick, and that he had no confidence in the mate. Some of the owners also distrusted his fitness when they employed him, and made an effort to engage another person in his stead; and one of them, after having heard of the disaster, expressed his regret that the person to whom he first applied had not taken his place.

The case of *Hough v. Western Trans. Co.*, 3 Wall. 20, was a libel *in personam* against the owners of the steamer *Falcon*. The vessel, while made fast to libellant's wharf, took fire through the negligence of the master and crew. The fire communicated to the wharf, which was destroyed with the buildings on it and those adjacent. While the court held that the tort was committed on land and, not being maritime, the admiralty court was without jurisdiction, it upheld the principle of the liability of owners for the negligence of the master and crew as follows:

The owner of a vessel is liable for injuries done to third persons or property by the negligence or malfeasance of the master and crew while in the discharge of their duties and acting within the scope of their authority. It is upon this principle that the defendants are liable, if at all, to the libellants for the damages sustained. The circumstance that the agents were in the employment of the owners on board the vessel, and that the negligence occurred while so em-

ployed, and which occasioned the damage, gives to the libellants the right of action.

This is, indeed, simply the general law of master and servant or principal and agent.

10. Temporary Ownership.—The ship may be chartered so that the hirer will become, in law, her temporary owner. This is ordinarily accomplished by means of a written contract called a charter party. It may contain whatever agreements the parties choose but when its legal effect is to give the hirer exclusive possession, control and management, so that he appoints the master, runs the vessel and receives the entire profits, there is a demise or conveyance of the ship and the hirer becomes owner *pro hac vice*, or, for the time being. He is then responsible for her contracts and torts and may limit his liability as if he were the actual owner and the latter is freed from personal responsibility. The situation is like a lease of premises on land to a tenant. The officers and crew become the agents or employees of the charterer and, in matters of contract particularly, as for supplies and repairs, the ship may not be subject to maritime liens if the creditor has notice of the terms of the charter party which preclude their creation. To effect this change into temporary ownership, the terms of the instrument should be plain and explicit; if indefinite or ambiguous, the construction will be against a demise of the ship, the courts favoring an interpretation which preserves the liabilities and liens incident to the permanent title.

The temporary ownership of a vessel by a person other than the real owner does not relieve the ship herself from those liabilities which attach to her in any event: For example, her liability for damage caused others by her torts, as faulty navigation; or from liability under those contracts for which the ship itself is primarily responsible, such as contracts for bunkers and supplies and necessary repairs elsewhere than in the home port. This principle is laid down in the case of the *Barnstable*, 181 U. S. 464, as follows:

The law in this country is entirely well settled that the ship itself is to be treated in some sense as the principal and as personally liable for the negligence of any one who is lawfully in possession of her whether as owner or charterer.

And in the case of *Sherlock v. Alling*, 93 U. S. 99, where it was said:

By the maritime law the vessel, as well as owners, is liable to the party injured for damages caused by its torts. By that law the vessel is deemed to be an offending thing and may be prosecuted without any reference to the adjustment of responsibility between the owners and the employees for the negligence which resulted in the injury.

The claim of the true owner to his vessel will not, however, be defeated by fraudulent acts of the temporary owner to which the real owner was not privy, because in such a case the theory of the agency of the master or temporary owner for the real owner fails. This subject is discussed in the leading case of the *Freeman*, 18 How. 182. In that case the temporary owner caused the master to sign bills of lading, certifying that a quantity of flour had been shipped on board the schooner from Cleveland to Buffalo by the temporary owner consigned to the libellants. No such flour had in fact been shipped and the consignees, who had advanced money on the bills of lading, libeled the ship. The real owner filed a claim to the vessel. The Court (Curtis, J.) said:

Bills of lading themselves are not real contracts of affreightment, but only false pretenses of such contracts; and the question is, whether they can operate, under the maritime law, to create a lien, binding the interest of the claimant in the vessel.

Under the maritime law of the United States the vessel is bound to the cargo, and the cargo to the vessel, for the performance of a contract of affreightment; but the law creates no lien on a vessel as a security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made, and a cargo shipped under it.

In this case there was no cargo to which the ship could be bound, and there was no contract made, for the performance of which the ship could stand as security.

But the real question is, whether, in favor of a *bona fide* holder of such bills of lading procured from the master by the fraud of an owner *pro hac vice*, the general owner is estopped to show the truth, as undoubtedly the special owner would be.

We are of opinion that, under our admiralty law contract of affreightment, entered into with the master, in good faith, and within the scope of his apparent authority as master, bind the vessel to the merchandise for the performance of such contracts, wholly irrespective of the ownership of the vessel, and whether the master be the agent of the general or special owner.

For the ground on which we rest the authority of the master, who is either special owner or agent of the special owner, is, that when the general owner intrusts the special owner with the entire control and employment of the ship, it is a just and reasonable implication of law that the general owner assents to the creation of liens binding upon his interest in the vessel, as security for the performance of contracts of affreightment made in the course of the lawful employment of the vessel. The general owner must be taken to know that the purpose for which the vessel is hired, when not employed to carry cargo belonging to the hirer, is to carry cargo of their persons; and that bills of lading, or charter-parties, must, in the invariable regular course of that business, be made, for the performance of which the law confers a lien on the vessel.

He should be considered as contemplating and consenting that what is uniformly done may be done effectually; and he should not be allowed to say that he did not expect, or agree, that third persons, who have shipped merchandise and taken bills of lading therefor, would thereby acquire a lien on a vessel which he has placed under the control of another, for the very purpose of enabling him to make such contract to which the law attaches a lien.

There can be no implication that the general owner consented that false pretenses of contract, having the semblance of bills of lading, should be created as instruments of fraud; or that, if so created, they should in any manner affect him or his property. They do not grow out of any employment of the vessel; and there is as little privity or connection between him, or his vessel, and such simulated bills of lading, as there would be between him and any other fraud or forgery which the master or special owner might permit.

Nor can the general owner be estopped from showing the real character of the transaction, by the fact that the libellants advanced money on the faith of the bills of lading; because this change in the libellants' condition was not induced by the act of the claimant, or of any one acting within the scope of an authority which the claimant had conferred. Even if the master had been appointed by the claimant, a willful fraud committed by him on a third person, by signing false bills of lading, would not be within his agency. If the signer of a bill of lading, was not the master of the vessel, no one would suppose the vessel bound; and the reason is, because the bill is signed by one not in privity with the owner. But the same reason applies to a signature made by a master out of the course of his employment. The taker assumes the risk, not only of the genuineness of the signature, and of the fact that the signer was master of the vessel, but also the apparent authority of the master to issue the bill of lading. We say the apparent authority, because any secret instruction by the owner, inconsistent with the authority with which the master appears to be clothed, would not affect third persons. But the master of a vessel has no more than apparent unlimited authority

to sign bills of lading, than he has to sign bills of sale of the ship. He has an apparent authority, if the ship be a general one, to sign bills of lading for cargo actually shipped; and he has also authority to sign a bill of sale of a ship, when, in case of disaster, his power of sale arises. But the authority, in each case, arises out of, and depends upon a particular state of facts. It is not an unlimited authority in the one case more than in the other; and his act, in either case, does not bind the owner, even in favor of an innocent purchaser, if the facts upon which his power depended did not exist; and it is incumbent upon those who are about to change their conditions, upon the faith of his authority to ascertain the existence of all the facts upon which his authority depends.

On these grounds, we are of the opinion that, upon the facts as they appear from the evidence in the record, the maritime law gives no lien upon the schooner that the claimant is not estopped from alleging and proving those facts.

It should be noted that the mere record title does not conclusively establish ownership. That title may be only security for the real owner out of control. The real facts may be shown when necessary (*Davidson v. Baldwin*, 79 Fed. 95).

11. Managing Owner.—The shore business of a ship is usually attended to by an agent or representative called the "managing owner," "ship's husband," "shore-captain," "port-captain," "managing-agent," or "manager." Different expressions prevail in different localities but they all mean substantially the same thing—an agent of the owners charged with keeping the ship in good repair and finding business for her. He has authority to direct all proper repairs, equipment and outfit, to hire the officers and crew, to make contracts for freight, to collect and disburse the earnings. He should see that the ship is seaworthy and supplied with all necessary and proper papers. He has no implied authority to borrow money, nor surrender a lien for freight, nor to insure; he cannot bind the owners to the expenses of a lawsuit without their special consent. It is doubtful whether he can, in any event, pledge the credit of the owners beyond their interest in the ship and it is probable that they are entitled to the statutory limitation of liability against all his contracts or torts in which they do not personally participate. If, however, the ship is owned by a corporation, it is not advisable that any of the directors or officers should also be the managing owner, as his "privity or knowledge" may thereby attach to the corporation.

In *Woodall v. Dempsey*, 100 Fed. 653, the Court found the facts to be as follows:

The suit is for \$3,513, a balance due for repairs. The work was done at Baltimore costing \$16,000. The home port of the vessel was Philadelphia, the owners being Patrick Dempsey and Henry Hess, who reside here; the former having four-fifths, the latter one. Dempsey, managing owner, ordered and superintended the repairs. Mr. Woodall sought the work for his company, and came to Philadelphia to obtain it. At that time it was supposed \$5,500 would cover the cost. The vessel was subsequently taken to the libellants' place at Baltimore and the work commenced in pursuance of arrangements made here. It was afterwards found that much more must be done than had originally been contemplated, and a much larger bill incurred. On the completion of the work, notes (of Dempsey) were given for the \$3,513 unpaid, and the vessel was delivered to the owners.

Woodall brought an action *in personam* against Dempsey and Hess for the \$3,513. It appeared that plaintiff dealt with Dempsey alone and there was no evidence to show that he took any action or made any expenditure on the credit of Hess. The Court said:

In my opinion the case turns on the power of Dempsey, considered merely as managing-owner, to bind Hess by the contract for repairs. Upon this subject the decision in *Spedden v. Koenig*, 24 C. C. A. 189, 78 Fed. 504, relied on by the respondents, seems to be much in point. The syllabus of the case states correctly the rule applied by the court:

"In the home port, where all the owners reside, the managing owner, though registered as such at the custom house, can not, merely by virtue of that relation, order supplies and bind his coowners to a personal liability therefor."

12. Compensation and Lien.—The compensation of the managing owner or ship's husband depends upon contract, express or implied, with the owners. In some localities, usage may provide a commission on the amounts of money which he handles. Where he is not one of the owners, the law would doubtless imply a promise to pay him a reasonable compensation; where he is a part owner himself, it is doubtful if compensation could be recovered in the absence of a definite agreement; ordinarily tenants in common are not entitled to charge each other for services rendered in the care and management of the common property, in the

absence of a statute or special contract. The managing owner is not entitled to a lien upon the ship for his compensation or disbursements but he may have a lien upon the profits of a voyage in his hands or upon the proceeds of the ship in the same situation.

REFERENCES FOR GENERAL READING

Shipping and Admiralty, Parsons, Vol. I, Chapter IV.

Admiralty, Hughes, Chapter XV.

Spedden v. Koenig, 78 Fed. 504.

Law of Part-Owners of Vessels, 88 Am. Dec. 364.

Gillespie v. Winberg, 4 Daly (N. Y.) 318.

Mitchell v. Chambers, 43 Mich. 150.

Maritime Law, Saunders, Chapters I and XV.

CHAPTER IV

THE MASTER

1. Appointment and General Authority.—The master is the commander of a merchant vessel. He has full charge of, and personal responsibility for the navigation and control of the ship, passengers, crew and cargo as the representative and confidential agent of the owner. The position is one of the most dignified and responsible known to the law.

In order to have the ship seaworthy, an owner must provide a master who is fully competent in respect of care, skill and honesty, a man of sound judgment and discretion; and in general, there must also be provided one of sufficient ability to supply his place, in case of accident or disability. (*The Niagara*, 21 How. (U. S.) 7; 2 Parsons Sh. & Ad. 1.)

Correspondingly, he is an officer to whom great power and wide discretion are necessarily confided. His authority is summary and often absolute, especially at sea, and can seldom be resisted by those over whom he is placed — as Chancellor Kent has expressed it: “He should have the talent to command in the midst of danger, and courage, and presence of mind to meet and surmount extraordinary perils. He should be able to dissipate fear, to calm disturbed minds, and inspire confidence in the breasts of all who are under his charge, in tempests as well as in battle. The commander of a ship must give desperate commands; he must require instantaneous obedience. He must watch for the health and comfort of the crew, as well as for the safety of the ship and cargo. It is necessary that he should maintain perfect order, and preserve the most exact discipline under the guidance of justice, moderation and good sense.”

Our statutes require that only those whom the law has examined and approved shall occupy that position. The master must be an American citizen (Rev. St. § 4139); he must have a license from the Inspectors, who are charged to examine into his charac-

ter and habits, as well as his technical qualifications (§ 4439);¹ he is sworn to the performance of the duties of his office (§ 4445); he must exhibit his license to the public (§ 4446); he is subject to summary punishment for incompetency (§ 4450); and his personal liability cannot be limited, as the owners may by law. In short the law contemplates the selection of picked men as masters in the merchant marine, and forbids the employment of others.

No formalities are required in his appointment by the owner. Any authorization which would suffice to otherwise create the relation of master and servant, or principal and agent, is enough (The Boston, Blatch. & H. 309). His contract need not be in writing, even if for more than one year. His wages are a matter of contract; he has no lien on the ship (The Nebraska, 75 Fed. 598), unless, possibly, one is created by the local law of the ship's flag.

In case of disaster, his duty requires him to stay by the ship as long as there is any possibility of good resulting therefrom. The popular phrase that "the captain should be the last man to quit the ship" is well founded in law (The Niagara, 21 How. (U. S.) 7).

His authority is generally implied and is according to the law of the ship's flag. Generally speaking, he is the owner's agent and his authority extends to all matters within the scope of his appointment. Where the owner is present, or easily accessible, this authority is narrowed, but otherwise it may be very broad, and measured only by the necessities of the situation, and the use and employment of the ship.

On shipboard, his authority is supreme, except, possibly, in the presence of the owner.

He has power to enforce discipline and inflict punishment, not unlike that in the relationship of parent and child, or teacher and pupil, save that he is forbidden by statute to inflict corporal punishment (Act of March 4, 1915). The old flogging days, therefore, are over, and the master who inflicts corporal punishment is guilty of a crime. He may, in proper cases, discharge or disrate members of the crew.

On the other hand, the law charges him with the duty of seeing

¹ There are a few instances in which a master need not be licensed. All masters of steamers must be licensed, all masters of sailing vessels of over 700 tons and all vessels of over 100 tons carrying passengers for hire (§ 4438). Other masters need not be licensed.

that the crew has sufficient provisions (§ 4564); proper medical care (§ 4569); protection against unlawful violence, and the like; and he is criminally liable for abandoning sailors in a foreign port (§ 5363).²

2. Personal Liability.—His personal liability is practically unlimited. The owner may confine his liability to the value of the ship but the master has no such privilege. Thus materialmen may sue the master personally for supplies and repairs (General Admiralty Rule 12);³ the sailors may sue him for their wages (Rule 13); the pilot, for pilotage (Rule 14); suits for collision may be brought against him alone (Rule 15), and he is responsible for moneys loaned the ship in a foreign port (Rule 17); so, also he is liable for cargo injured by the ship and may be sued by the underwriters therefor (Co. v. Dexter, 52 Fed. 152).

3. Restriction on Authority.—The master is the owner's agent in all matters fairly within the scope of his authority but has no more authority to bind him than any other special agent. He is not a general agent and his powers are usually confined to the property in his charge. In cases of necessity, when the owner is not present, his authority is very broad but it is correspondingly restricted when the owner is present. He cannot bind the owner personally beyond the value of the ship and freight pending; he cannot vary or annul the owner's agreements; he cannot make a promissory note binding on the owner; or bind him for cargo not actually on board by a bill-of-lading;⁴ or admit an invalid claim; nor purchase a cargo on his account.

² A question sometimes arises whether a particular individual occupies the position of master or not. The fact that the man is enrolled as master is not necessarily conclusive of this question. Where a man was clothed with and did actually exercise the duties of master during the illness of the registered master he was held to have been *de facto* master and hence not entitled to a maritime lien for his wages (Hattie Thomas, 29 Fed. 297). On the other hand, the engineer of a dredge who was highest officer on the vessel and directed the firemen and other hands but who had no authority to engage or dismiss men or purchase supplies, was held not to be the master and his lien for wages was sustained (Atlantic, 53 Fed. 607). In the *Calypso*, 230 Fed. 962, it was said: "the master of a ship is *pro hac vice* the agent of the owner and . . . his appointment or authorization lies in contract, . . . if the master has not been appointed by the owner enrollment cannot make him such."

³ The rules referred to are "Rules of Practice for the Courts of the United States in Admiralty and Maritime Jurisdiction on the instance side of the court."

⁴ In a number of leading cases attempts were made to hold the owner liable for shortage in cargo where the master had signed bills of lading

In dealing with other persons on board his vessel his authority is as broad as the exigencies of his situation require and he may, in proper cases, and after exhausting pacific measures put even passengers under arrest. But he cannot delegate this authority to minor officials or others on board but must personally exercise such responsible duties and see to it that nothing unreasonable is done. It has been held that while he may restrain, or even confine, a passenger who refuses to submit to the necessary discipline of the ship, he ought not to inflict any higher punishment than a reprimand upon a passenger without first conferring with his officers and entering the facts on the log. His authority to punish members of the crew must be exercised with moderation and in reason. He has no authority to punish by flogging or the use of any illegal instrument and in testing the legality of punishment or chastisement the methods and weapons employed are important.⁵

for goods not actually on board. Among these are the *Freeman*, 18 How. 182; *Grant v. Norway*, 10 C. B. 665; *McLean v. Fleming*, L. R. 2 H. L. Sc. 128 (English cases), and *American Sugar Refining Co. v. Maddock*, 93 Fed. 980. The principle laid down in these cases is "not merely that the captain has no authority to sign a bill of lading in respect to goods not on board but the nature and limit of his authority are well known among mercantile persons."

⁵ *Ragland v. Norfolk & Washington Steamboat Co.*, 163 Fed. 376. This was a libel *in personam* in which the libellant claimed damages on account of an alleged improper arrest while a passenger on board respondent's vessel. The court said:

"Officers of steamboats and passenger vessels should be exceedingly careful before putting a passenger under arrest. They are the servants of the passengers on their boats, paid for the purpose of treating them kindly. The trouble on this occasion arose from a misapprehension on the part of the captain of the steamer of his power and duty as master of the ship. The master of a passenger steamer is an exceedingly important officer. He should be of exceptional firmness, intelligence and character, and more than ordinarily endowed with common sense and tact and always gentle and courteous. He has vast power in dealing with passengers in situations that are liable to and do arise on his vessel, and he may in a proper case after exhausting pacific measures, place a passenger under arrest, but, to suppose, as he testified he did, that he could delegate this authority to minor officials or others on board, cannot be sanctioned. When the time comes to arrest passengers, an occurrence on a steamboat only second in importance to navigating the vessel in safety, it is his duty to properly care for and protect them as far as is reasonably possible, and personally to exercise the responsible duties at hand, and at least give personal direction to what is being done."

The *Lizzie Burrill*, 115 Fed. 1015, with reference to the duty of the master toward the crew. The court quotes a number of American and English authorities. The syllabus summarizes the decision as follows:

"It is the duty of the master of a ship while at sea to protect his crew from violence and brutal treatment by other officers under his command.

"The master of a ship while on board is the agent of the owners in respect to all matters which come within the scope of his duty, and the

4. Rights of Master.— He is entitled, of course, to have his wages paid according to his contract — though he has no lien for them on the ship — and such a contract is valid and enforceable although made without writing and for more than one year. He is also entitled to recompense for all money advanced for the ship within the scope of his employment and to indemnity against loss or damage which he may sustain therein without his own fault. He is also entitled to care and cure for injuries sustained in the service of the ship, irrespective of his own fault, like other members of the ship's company. He is entitled to extra wages for services outside of his line of duty.

He has a lien on the freight ⁶ for his wages, disbursements, expenses and necessary liabilities. This may be asserted by withholding from the moneys collected by him or by an attachment or garnishment. When the ship is in charge of a licensed pilot ⁷ the master should remain in command except so far as the pilot's duties are concerned and see that there is a sufficient watch on deck and that the men are attentive to their duties; he may advise with the pilot and even displace him in case of intoxication or manifested incompetence. By virtue of his general agency for the owners in relation to the ship, he may sue in his own name, in their behalf, to recover for collision or for breach of contract of affreightment or on any other account connected with the business entrusted to him.

5. Wages.— His wages depend on the contract with the owner and, where that is not express, will be allowed in accordance with the prevailing usage of the place and trade. The fact that he is a part-owner does not affect his rights in this respect. He may pay himself out of freight-money which passes through his hands. In case of wrongful discharge he may sue for his wages for the balance of the term in one action for damages for breach of contract or bring successive suits for each installment as it falls due. He is bound, however, to reduce his damages as much as he can by other employment. It has been held that where there is delay

owners and ship are liable in damages to a seaman, not only for the unwarranted ill-treatment of such seaman by the master himself, but for his failure to perform his duty to protect the seaman from assaults and ill-treatment by other officers."

⁶ The frequently misused term "freight" means the compensation for carrying the cargo and not the goods thereunder.

⁷ See Chapter XII, "Pilotage," *infra*.

in paying him without due cause, he may claim extra wages like other members of the crew.

6. *Lien*.—As has been remarked the general rule is that the master has no lien on the ship for his wages. In the *Orleans v. Phoebus*, 11 Peters 175, wherein Phoebus sought to enforce a lien on the steamboat *Orleans* for his wages as master, the Supreme Court said:

By the maritime law the master has no lien on the ship even for maritime wages.

This is supposed to be for the reason that he contracts on the personal credit of the owner and also because it would tend to impair the owner's personal confidence in his integrity. Another ground is that where the master collects the freight he can pay himself directly and so needs no lien. But a lien may be given by the terms of his contract or by a statute of the state from which the vessel hails; if it is, it will be enforced in the admiralty.

He has no lien on the cargo belonging to the owner of the ship, and, according to the weight of authority, no lien upon cargo belonging to any other shipper. He has, however, as has been said, a lien on the freight earned by the vessel for his wages, disbursements and necessary liabilities. This may be asserted by withholding from the moneys collected by him or by an attachment or garnishment. In the *Arcturus*, 17 Fed. 95, the vessel had on board a quantity of telegraph poles owned by a shipper and intended for delivery at Sandusky, upon which the shipper was to pay freight in the usual way. Before the poles were unladen at Sandusky, the vessel was seized by the marshal under a libel filed by certain creditors, so that the master could not and did not unload the poles, and the owner was compelled to pay \$70 to have them unloaded. In addition to this, before they were unladen the owner of the poles was compelled to pay into the registry of the court the entire freight which would have been earned had the vessel delivered the poles to him. The master filed a libel, asserting that the whole freight money should be applied to his unpaid wages, and claiming also a lien on the poles, the cargo, for his wages. The court found that the master had no lien on the cargo for his wages beyond the amount of the freight; that he was only entitled to the freight actually earned by the vessel, that being the freight less what it cost to unload at Sandusky, and that he was

entitled to a decree for that part of the freight so actually earned, to be applied on his wages as master.

Where the master performs seamen's duties in addition to his own it has been held he is not entitled to a lien for compensation for such work, but in some more recent cases such liens have been allowed. There is a substantial conflict of authority on this point.

7. Relations to Cargo.— He has no authority to alter a charter party, nor to sign a bill of lading for goods not shipped or containing a misdescription of the cargo. He must not mis-date a bill of lading nor issue one contrary to the terms of the charter. He must see that the cargo is well and sufficiently stored in accordance with law and that the ship is not overladen. The law contemplates that the master himself must be a competent stevedore. Thus in the leading case of the *Niagara*, 21 How. 7, it is said:

He (the master) must take care to stow and arrange the cargo, so that the different goods may not be injured by each other, or by the motion of the vessel, or its leakage; unless, by agreement, this duty is to be performed by persons employed by the shipper. In the absence of any special agreement, his duty extends to all that relates to the lading, as well as the transportation and delivery of the goods; and for the faithful performance of those duties the ship is liable, as well as the master and owners.

Even where the shipper employs the stevedores, it remains the right and duty of the master to control them if they are endangering the ship's safety. Thus in the *Elton*, 83 Fed. 519, where the charter party provided that the stevedore was to be employed and paid by the contractor and was to load the steamer under the master's direction, it was said:

At no time does the master lose his proper place in the control of his ship and everything connected therewith. The stevedore is not an independent contractor, doing the work, which, when completed, is to be turned over to the master for his approval or disapproval; but he must load the steamer at all times under the direction and subject to the control of the master.

During the voyage and until the goods are delivered he stands as bailee and has a high degree of responsibility for their safekeeping. He must pursue the voyage without deviation or delay except for the purpose of saving life. He must be watchful to protect the cargo, in whole and in parts, as against deterioration and damage.

Safe custody is as much a part of his duty as safe carriage and delivery. In case of emergency and necessity he becomes as much an agent of the cargo as of the owner of the ship and may sacrifice a part for the safety of the whole venture, or mortgage or sell the same, or tranship it. In the event of peril the duty and power devolve upon the master to determine whether a jettison be necessary. As the court said in *Lawrence v. Minturn*, 17 How. (U. S.) 100:

If he was a competent master, if an emergency actually existed calling for a decision, whether to make a jettison of a part of the cargo; if he appears to have arrived at his decision with due deliberation, by a fair exercise of his skill, and discretion, with no unreasonable timidity, and with an honest intent to do his duty, the jettison is lawful. It will be deemed to have been necessary for the common safety, because the person to whom the law has entrusted authority to decide upon and make it has duly exercised that authority.

But though the master may jettison cargo to lighten a ship in peril, he may not, for that purpose, give cargo away. It is not his to give, and if he attempts to do so, the donee takes no title and is liable for the conversion of it as for embezzlement (*The Albany*, 44 Fed. 431).

The duties and powers of masters of vessels in regard to cargo, as they develop out of the exigencies of navigation and the varied situation abroad, are much broader than those of the agents of carriers by land, because the circumstances are so very different. Such a master has authority to do whatever is really necessary to preserve the interests of an absent owner or consignees. He is bound to the exercise of diligence and good faith to give the owner or consignee timely information; and to follow instructions if they can be obtained. If his possession of the goods is interfered with by legal process or seizure, he must give notice, if possible, and in the meantime take all proper steps to protect or recover the goods. He may be bound to take legal proceedings or answer for the damages caused by his failure to do so.

8. Power to Sell or Mortgage Cargo.—This power to dispose of the cargo arises out of the necessity of the case. The duty is to complete the voyage, if possible. Money for repairs and expenses can frequently only be secured by disposing of some of the property in the master's charge. If so, he has the requisite power; of course, he should first realize what he can on the credit of the

ship and freight-money but after this he may resort to the cargo and pledge or even sell it accordingly. In the leading case of *Post v. Jones*, 19 How. (U. S.) 150, Mr. Justice Grier said:

It cannot be doubted that a master has power to sell both vessel and cargo in certain cases of absolute necessity . . . Without pretending to enumerate or classify the multitude of cases on this subject, or to state all the possible conditions under which this necessity may exist, we may say that it is applied to cases where the vessel is disabled, stranded, or sunk; where the master has no means and can raise no funds to repair her so as to prosecute his voyage; yet where the *spes recuperandi* may have a value in the market, or the boats, the anchor, or the rigging, are or may be saved, and have a value in market; where the cargo, though damaged, has a value, because it has a market, and it may be for the interest of all concerned that it be sold.

Such dealing with the cargo must be prudent and in the interest of the cargo-owner; the master must not sacrifice the cargo to the ship more than the ship to the cargo. If he can prudently delay for communication with the owner he must do so; the exercise of this power depends upon the necessity and the utmost good faith.

The case of *Australasian Steam Navigation Co. v. Morse*, L. R. 4 P. S. 222; 1 Aspin. 407; 27 L. T. Rep. N. S. 357; 8 Moore P. C. N. S. 482; 20 Weekly Rep. 728; 17 Eng. Reprint 393, was decided by the Privy Council in 1872, on appeal from the Supreme Court for New South Wales. It appeared that a quantity of wool had been shipped in December, 1865, on board the *Boomerang* by owners living inland, for transportation from Rockhampton to consignees in Sydney. The vessel stranded and filled and the cargo was so damaged by water that it became dirty, heated and liable to ignition. It was transferred to a relief vessel which had been sent out from Rockhampton and was returned to that place, where there were no facilities for storing or drying it, and it was in danger of total loss. There does not appear to have been any means of communicating promptly with the shippers, but there was testimony on the question whether it might have been possible to reach the consignees in Sydney, a distance of 900 miles, by telegraph, considering the imperfect state of the telegraph in New South Wales in 1865, the method of management of the particular telegraph line, and the fact that communication, to accomplish anything, must have been attempted on Sunday or on the

next day which was Christmas. Under these circumstances, the master, after having the wool surveyed by the local Lloyds agent and a merchant, sold it without attempting to communicate. For the Privy Council, Sir Montague Smith announced the law as follows:

The general principles of law are not in dispute, viz., that the authority of the master of a ship to sell goods of an absent owner is derived from the necessity of the situation in which he finds himself placed; and consequently that, to justify his thus dealing with the goods he must establish (1) the necessity for the sale; and (2) his inability to communicate with the owner and obtain his instructions. Under these conditions and by force of them the master becomes the agent of the owner, not only with power but under the obligation (within certain limits) of acting for him; but he is not in any case entitled to substitute his own judgment for the will of the owner in the strong act of selling the goods where it is possible, as hereafter explained, to communicate with the owner and ascertain his will.

The Council defined the necessity of sale as meaning "that the course taken must be clearly highly expedient," "the best and most prudent thing to be done for the interest of the owner of the goods," and said:

A sale of cargo by the master may obviously be necessary in the above sense of the word, although another course might have been taken in dealing with it; for instance, if, in this case, the wool, which had no value but as an article of commerce, could have been dried and repacked and then stored or sent on, but at a cost to the owner clearly exceeding any possible value to him when so treated, it would plainly have been the duty of the master to sell, as a better course for the interest of the owner of the property than to save it by incurring in his behalf a wasteful expenditure. In other words, a commercial necessity for the sale would then arise, justifying the master in resorting to it.

On the subject of the necessity for communicating with the owners of the cargo, the Council say:

The possibility of communicating with the owners must, of course, depend on the circumstances of each case, involving the consideration of the facts which create the urgency for an early sale; the distance of the port from the owners; the means of communication which may exist; and the general position of the master in the particular emergency. Such communication need only be made when an answer can be obtained, or there is a reasonable expectation that it can be obtained before the sale. When, however, there is ground for such an expectation every endeavor, so far as the position in which he is

placed will allow, should be made by the master to obtain the owner's instructions.

There can be no doubt that the master is bound to employ the telegraph as a means of communication where it can usefully be done, but in this case the state of the particular telegraph, the way it was managed, and how far explanatory messages could be transmitted by it, having regard to the time and circumstances in which the master was placed, were proper subjects to be considered by the jury, together with the other facts, in determining the practicability of communication.

The necessities which may arise in the course of the voyage are innumerable and can hardly be classified, but the settled and reasonable rule is that the power corresponds to the necessity at hand. By the contract of carriage, the shipper and consignee impliedly authorize the master, when he cannot obtain instructions, to do everything within the general scope of his employment which a rational man of business might believe that a rational owner would certainly do for himself if he were present under the circumstances at hand. And even if the acts of the master were beyond the ordinary scope of his authority, they may be ratified by his principals and every ratification is the equivalent of an original specific authority. So, while it is a general rule that an agent may not delegate his authority the master may, in proper cases, appoint another in his place and stead; and such appointee will have the like powers as the original master. Circumstances may even arise where the master may sell the cargo though the owner may be in port and does not approve his action. Thus in the case of the *Brewster*, 95 Fed. 1000, the ship had a cargo of coal. After commencing her voyage she was forced to put back in port. Part of the coal had become wet and liable to spontaneous combustion; it being dangerous to proceed with it, the master tendered it to the shippers, who refused to receive it. He thereupon sold it. The Court upheld his action as being for the general good of the ship and cargo. This, however, was in the exercise of the master's duty to protect the safety of the whole ship and must not be understood as modifying the rule that the master, when no considerations, except those relating to cargo, are in question, may not substitute his judgment for that of the owner of cargo, where the owner's will is ascertainable. It should be noted that all the master's powers in regard to the cargo depend on the necessity

for their exercise and that, as long as that does not arise, he is really a complete stranger to the cargo between lading and discharge. While the voyage prospers he is only to carry it and must not intermeddle in any way.

9. Power to Sell Vessel.—Under like circumstances of necessity, the master may sell the ship herself, on a home shore as well as abroad, although never in the home port. Good faith and overwhelming necessity must concur. For his own protection, he should have a thorough examination made by competent surveyors and their sworn report stating her condition and advising a sale. In some places, this may be accomplished through a court of admiralty and this is the safest way.

This subject has been discussed more fully under the caption "Title and Transfer," §16, "Sales by Master." The case of the *Amelie*, 6 Wall. 18, there quoted, is the leading case. It should be observed that, if the exigency is not too urgent to admit of the necessary delay, the master is bound to communicate with the owner before selling the ship, and the purchaser is bound to know the circumstances so far as he can ascertain them by reasonable inquiry. He will not acquire a good title if the emergency did not justify the sale, provided he could have so ascertained by investigation.

10. Power to Create Liens.—This power is very broad. The master has an implied power to pledge the ship for all her necessities and thus to create all classes of contract liens upon her in the absence of the owner. The order of their priority is governed by the rules applicable to all maritime liens (see Chapter IX). He may create liens of materialmen for supplies, work, labor and repairs; of sailors for their wages; for all necessary services rendered the ship; advances of money; dockage; towage; and the like. So he may, involuntarily create liens upon her for torts, as by negligent carriage of cargo, collisions, or personal injury. The leading exposition of law on this subject is that of Justice Story in the early case of the *Aurora*, 1 Wheat. 96, decided in 1816, wherein it was said:

The law in respect to maritime hypothecations is, in general, well settled. The master of the ship is the confidential servant or agent of the owners, and they are bound to the performance of all lawful contracts made by him, relative to the usual employment of the ship, and the repairs and other necessities furnished for her use. This rule

is established as well upon the implied assent of the owners as with a view to the convenience of the commercial world. As, therefore, the master may contract for repairs and supplies, and thereby, indirectly, bind the owners to the value of the ship and freight, so, it is held that he may, for the like purposes, expressly pledge and hypothecate the ship and freight, and thereby create a direct lien on the same, for the security of the creditor. But the authority of the master is limited to objects connected with the voyage, and, if he transcends the prescribed limits, his acts become, in legal contemplation, mere nullities. Hence, to make a bottomry bond executed by the master a valid hypothecation of the ship, it must be shown by the creditor that the master acted within the scope of his authority; or, in other words, it must be shown that the advances were made for repairs and supplies necessary for effectuating the objects of the voyage, or the safety and security of the ship; and no presumption should arise that such repairs and supplies could be procured upon any reasonable terms, with the credit of the owner independent of such hypothecation. If, therefore, the master have sufficient funds of the owner within his control, or can procure them upon the general credit of the owner, he is not at liberty to subject the ship to the expensive and disadvantageous lien of an hypothecatory instrument.

II. Duties on Disaster.— If the ship becomes stranded, disabled or wrecked, the master is bound to use all reasonable efforts to save all that may be rescued out of the disaster. The maritime law contemplates that he must be the last man to leave the ship in every sense of the expression. He must be diligent to obtain the aid of salvors and to protect the property in his charge. As far as may be, the cargo must be saved, stored and transhipped to its destination. The crew must have provision made for return and the wreck itself preserved as far as it is of value. He cannot give away any of the property or needlessly sacrifice any of it. He should promptly communicate with his owners and underwriters, both ship and cargo, and, until lawfully superseded, has all the authority which the necessities of the situation demand.

While the master is bound to follow instructions as to the course of his voyage, and may not deviate unless forced to do so by stress of weather or for the safety of vessel, crew or cargo, he may always deviate from his course for the purpose of saving life. He is not bound to lie by or delay his voyage for the purpose of preserving the property of third persons, though he may deviate, in the exercises of a sound discretion, to save property in peril.

12. Log Book and Protests.— The log book is the ship's journal in which is entered her position from day to day, winds, currents, sea, course, speed, and all other matters of importance in relation to the vessel. The entries in it should be regularly and correctly made, as in the regular course of business, and when so kept, it will become a record of great importance in all matters relating to the ship's business and litigation. While the entries may be customarily made by the mate or other subordinate officer, the master should see that they are properly kept up and satisfy himself of their correctness as he is primarily responsible for all the transactions of the voyage. The statutes (U. S. Comp. St. 1916, §8036) require every vessel making foreign voyages, or between Atlantic and Pacific ports, to have an official log book and charge the master with twelve classes of entries therein, under penalties.

All cases of offenses or of misconduct by members of the crew are required to be recorded; also all cases of illness, death, birth and marriage on board; the name of any seaman who ceases to be a member of the crew; the wages of any seaman who dies during the voyage; the sale of the effects of any such seaman, and a description of any collision that may occur.

In introducing a ship's log in evidence, it must be proved in the same manner as any other document; that is to say, it enjoys no special evidentiary status.

In case of damage or disaster during the voyage, or suspicion thereof, the master should within twenty-four hours of his arrival in port cause a notary public or consul to "note a protest" in regard to the fact; this "noted protest" should be extended before a notary as soon thereafter as possible, and at any rate, on arrival at destination and while recollection is fresh. The extended protest will be upon the usual form and contain a plain account of the misfortune and damage. As it will form the basis of any claim of underwriters or adjustment of damages, great care should be taken to express the facts clearly and according to their legal results. The master is charged with this duty and should execute the protest, together with his officers and such of the crew as have knowledge of the facts involved.

REFERENCES FOR GENERAL READING

- Commentaries*, Kent, III, Lecture XLVI.
Shipping and Admiralty, Parsons, Vol. II, Chapter XIV.
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Niagara, 21 How. 7.
Nebraska, 75 Fed. 598.
Rupert, 213 Fed. 263.
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Spedden, 184 Fed. 283.
Yarkand, 120 Fed. 887.
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Ancaios, 170 Fed. 106.
Aguan, 48 Fed. 320.
Trigg, 37 Fed. 708.

CHAPTER V

SEAMEN

1. Favored in Maritime Law.— The general maritime law has always endeavored to protect the rights of seamen and its solicitude for their welfare has been expressed in the laws of all commercial countries. They are, as Justice Story said in *Brown v. Lull*, 2 Sumner 449, "a class of persons remarkable for their rashness, thoughtlessness and improvidence. They are generally necessitous, ignorant of the nature and extent of their own rights and privileges, and for the most part incapable of duly appreciating their values. They combine in a singular manner, the apparent anomalies of gallantry, extravagance, profusion in expenditure, indifference to the future, credulity which is easily won, and confidence which is readily surprised. Hence it is, that bargains between them and shipowners, the latter being persons of great intelligence and shrewdness in business, are deemed open to much observation and scrutiny; for they involve great inequality of knowledge, of forecast, of power, and of condition. Courts of Admiralty, on this account, are accustomed to consider seamen as peculiarly entitled to their protection; so that they have been, by a somewhat bold figure, often said to be favorites of Courts of Admiralty. In a just sense, they are so, so far as the maintenance of their rights, and the protection of their interests against the effects of the superior skill and shrewdness of masters and owners of ships are concerned."

Hence, from the ancient sea codes to the most recent legislation, there is a constant provision for their welfare and protection. Their occupation is an honorable one and has its privileges accordingly; it is also one of great responsibility and has its duties and the law has both in mind.

2. Who Are Seamen?— The word "seaman" includes every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board of any vessel belonging to any citizen of the United States (R. S. 4612). A question sometimes

arises whether a particular person occupies the status of seaman. Some discussion of this will be found in §13 of this chapter, and in Chapter 4, §2.

3. **Contract.**— Their relation to the shipowner is one of contract. The contract is usually in the form of Shipping Articles and in writing. A form for use in foreign trade (with some exception) is given in Rev. St. §4511 as amended. For other voyages it is not always essential that the contract be in writing. What its form and language, the law will practically construe it as containing certain underlying engagements by both parties;— on the part of the owner and master, that the wages shall be paid; the voyage legal; the ship seaworthy and fully equipped and supplied; the voyage definite and without deviation; the treatment by the officers, decent and humane; the food sufficient; care and cure in event of injury or sickness; and safe return to their own country;— and on the part of the seamen, to exert themselves to the utmost in the service of the ship; to have sufficient training and health for the positions which they profess; to report on board at the proper time and place and remain in the service until their engagements are performed; to be obedient to all lawful commands of the master and their superior officers; and to assist in maintaining good order and discipline throughout the ship.

4. **Wages Secured.**— The payment of wages is amply secured. They have a prior lien upon the ship and freight which will attach to her last plank. The master and the owner are personally liable and there can be no limitation of liability in this respect. Such wages are exempt from garnishment or attachment by creditors of the sailor and he may sue for them without giving security for costs. If wages are unlawfully withheld, he may have double for each day's delay.

5. **Forfeitures and Punishments.**— On the other hand, the seamen must perform their part of the contract. Refusal or neglect to work entails loss of wages, and wages are not due during a period of lawful imprisonment (Rev. St. §4528). Desertion entails forfeiture of clothes left on board and wages earned; absence without leave, not amounting to desertion, forfeits two days' pay and expenses of a substitute; quitting the ship before she is in security means a forfeiture of not more than one month's pay; willful disobedience at sea will be punished by confinement in irons

and further imprisonment on shore with loss of 4 days' pay. If continued, 12 days' pay is forfeited for each offense (Rev. St. §4596); assaulting the master or mate and willfully damaging the ship or cargo are punishable criminally by imprisonment and forfeiture of wages.

Corporal punishment is no longer permitted; its infliction is a misdemeanor punishable by the courts, and it also renders the owner and master liable for damages. The master may, however, use a deadly weapon when necessary to suppress mutiny but only when mutiny exists or is threatened.

The laws of the United States on the subject of Merchant Seamen will be found in detail in Title LIII of the Revised Statutes and are collected with the modern amendments, including the La Follette Seamen's Act of March 4, 1915, and with full annotations in Volume 7 U. S. Compiled Statutes, 1916, pages 8772 to 8924. The Seaman's Act of March 4, 1915, is also found in 38 St. at L. 11-64.

6. Personal Injuries.—Where a sailor is injured in the service of the ship he is entitled to care and cure at the expense of the ship, irrespective of any question of the negligence of any member of the ship's company and irrespective of whether the seaman was guilty of contributory negligence, but ordinarily, he can not recover damages unless fault can be brought home to the owner. He will also be entitled to his wages for the trip or voyage on which the injury occurred, unless discharged by voluntary consent under §4581 Rev. St. before the voyage ends.

In very recent years repeated assaults have been made upon the long established rule which prevented seamen from recovering on account of injury or death in line of duty. In *Southern Pacific Co. v. Jensen*, 244 U. S. 205, an employee engaged in maritime work attempted to recover damages for a maritime injury pursuant to the Workmen's Compensation law of New York. The Supreme Court held, that "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country," and that in so far as the Workmen's Compensation law of a state sought to confer upon seamen rights inconsistent with the general maritime law, the state Workmen's Compensation law was unconstitutional. Thereupon Congress by the act of October 6, 1917, undertook to confer upon suitors in admiralty "the rights and remedies under the Workmen's Com-

pensation Law of any state." Thereafter in *Knickerbocker Ice Co. v. Stewart*, decided May 17, 1920, the Supreme Court of the United States held that the act of Congress of 1917 was destructive of the uniformity of the principles of admiralty law, which the Constitution sought to preserve, and was therefore beyond the power of Congress to enact. Therefore, up to May 17, 1920, the date of the decision of *Knickerbocker Ice Co. v. Stewart*, the old rule of admiralty whereby sailors could not ordinarily recover damages for injuries in the course of their employment had successfully withstood all attacks by state legislatures and by Congress and remained the law. However, three weeks after the decision in *Knickerbocker Ice Co. v. Stewart*, Congress, by the Merchant Marine Act of June 5, 1920 (see Appendix), enacted the following:

That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such action shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

This provision, which seeks to confer upon seamen the rights enjoyed by railway employees under the Federal Compensation Act, has not yet been construed by the courts.

The rights of railway employees thus conferred upon seamen are those given by acts of Congress approved April 22, 1908, and April 5, 1910. These acts gave to the employees of railroads engaged in interstate and foreign commerce, a right of action against the employing carrier in case of injury or death of the employee, notwithstanding that the accident may have been caused by acts of a fellow servant or may have been due to one of the risks naturally incident to the employment, and notwithstanding that the plaintiff may have been guilty of contributory negligence, although in the latter case the damages are to be diminished in proportion to the amount of the employee's negligence. Suit

may be brought in the state or federal courts, which are given concurrent jurisdiction in such cases.

It should be observed that under neither the Merchant Marine Act nor the Railway Employers' Liability Acts is the jurisdiction to be exercised by the court sitting in admiralty. The jurisdiction invoked is that of the courts of common law.

Where, however, there is negligence on the part of the ship-owner in providing a seaworthy ship, or on the part of the officer in caring for the injured man, the admiralty will award damages; if there has been contributory negligence, it will not prevent recovery but the damages will be apportioned or divided (*The Max Morris*, 137 U. S. 1).

The principle on which vessels are held liable for injuries to seamen due to unseaworthiness is simply an application of the rule of law that every master is bound to provide his servant with a safe place to work; that is to say, a place as safe as any prudent man would provide for the performance of work of similar character, and that failure to provide such a safe place is actionable negligence. In the *Joseph B. Thomas*, 86 Fed. 658, it was held that where an employee on a vessel placed an empty keg on a pile of hatchway covers in such a position that an accidental jar caused it to fall in the hatch and injure a stevedore, the master and the owners were liable and the ship was held for violation of the duty to provide a safe place to work.

7. Duties in Disaster.—In case of shipwreck or disaster a sailor is bound to do all he can for the safety of the ship and cargo. This is in the line of his duty and does not merit extra pay. His lien for wages attaches to the last plank of the ship but he must do his share of the work required to preserve it.

In the *Shawnee*, 45 Fed. 769, the ship had suffered greatly from a severe storm and went under Mackinac Island for shelter. Much extra work was required by the crew and when the time came to proceed on the voyage they told the master that they would not go on unless an extra allowance of \$50 each was guaranteed. Under the stress of circumstances the master was constrained to acquiesce in the demand, but on arrival the owners refused to pay this extra amount although they tendered the regular wages. The sailors thereupon libeled the ship, but the Court, in a very emphatic opinion, declared that their conduct had amounted to mutiny and that their wages should be entirely forfeited.

Numerous decisions illustrate these rules.

In the *Troop*, 118 Fed. 769, a sailor fell from a yardarm and fractured his thigh shortly after the ship sailed; the captain might have put him in the port hospital but instead applied splints himself and sent the man to his bunk; he did nothing more for him until the vessel arrived at her destination, thirty-six days after, and even then neglected him for an additional five days before supplying proper medical care. The sailor suffered greatly during the voyage and became permanently injured. The Court held that the ship was liable for the master's failure to observe the rule of care to an injured sailor and awarded him \$4,000 with 6 per cent interest.

In the *Margarita*, 140 Fed. 820, the ship sailed from a port in Chili for Savannah. While off the west coast of South America and about to round Cape Horn a sailor lost his footing aloft and was precipitated into the sea. As he struck the water a shark, or some other marine monster, bit off his leg at the knee, but he was rescued by another of the crew who jumped after him. The ship was then about 7,000 miles from her destination. The master gave the sailor all the attention which the ship afforded and controlled the hemorrhage and inflammation by placing the stump in tar; he continued to give him regular attention during the voyage, detailed a man to supply his wants and provided him with a suitable diet; on arrival at Savannah he was immediately sent to the hospital. The Court held that there could be no further recovery inasmuch as the master had fully discharged all the obligations of the rule.

8. Offenses of Seamen.—Discipline being essential to the welfare of the ship and all on board, the maritime law punishes offenses of seamen against its code. Disobedience or misconduct in a sailor can not be tolerated or the ship would be in constant peril and its business frustrated. But the punishment must be reasonable and in proportion to the offense. The law will not endure tyranny or cruelty in any form. Flogging is abolished and prohibited by law and, generally, the only forms of punishment which may now be employed are forfeiture of wages or clothing, confinement on board, disrating and imprisonment on shore. Where an emergency arises, instant obedience may be compelled by force on the part of the officers and master, according to the necessity of the case, even to the taking of life, but cases of this kind are rare.

In any event, the punishment must be according to the exigency and not excessive or brutal. Unlawful orders may be disregarded and even the master arrested and confined if he attempts to commit a felony; but, in general, the sailor must not attempt to take the law into his own hands and it will be more judicious to submit to harsh treatment and seek his redress later in the courts.

The ordinary offenses of seamen are classed as mutiny, inciting revolt, desertion, disobedience, assaults, theft, fighting, and tampering with the cargo; but, in addition, they are liable for all crimes and offenses which would be punishable as such if committed on shore.

9. When Entitled to Leave Ship.—The sailor is not bound to continue in the ship when she becomes unseaworthy because his contract of service is based upon the condition that the ship is and shall be seaworthy. When such a condition exists, the crew is entitled to apply respectfully to the officers and urge that the ship return to port; if in port, they may request a survey and, if unseaworthiness is declared, the consul has authority to give them their discharge.

10. Desertion.—In the maritime law, desertion consists in quitting the ship and service by a sailor, without leave and against his duty, without an intent to return. If not justified, it works a forfeiture of wages. The mitigating circumstances must be such as amount to a reasonable excuse, founded on gross misconduct of the master or hard usage. Slight and transient causes will not answer, especially where the desertion appears to have been deliberate and premeditated, and not the result of sudden impulse. It was formerly the law that a deserting seaman might be arrested and imprisoned on shore by local magistrates on the complaint of the master and so compelled to return to his service (*Robertson v. Baldwin*, 165 U. S. 275). Recent legislation, however, has repealed the older statutes and there are now no laws of the United States which authorize the imprisonment of seamen deserting from vessels owned by citizens of the United States. This is probably true also in the case of foreign-owned vessels within American ports (*Ex parte Larsen*, 233 Fed. 708). Among the causes which have been held to justify desertion are sickness, unwholesome food, cruel treatment, deviation and unseaworthiness. But the justification must be clearly shown, for it is a serious thing to quit the ship, and the law will not permit it unless

the reasons are sound and substantial. Of course, besides the forfeiture of wages which desertion entails, the deserter will be liable to the owner for such damages as his breach of contract may cause. The offense may be committed by any member of the ship's company.

11. Self-defense.— Generally speaking, the remedy of the sailor for violence inflicted upon him on shipboard is to be sought in the courts of law alone. The exigencies of discipline require that, for the common good, authority on shipboard should not be resisted. Nevertheless cases occur where the right of self-defense may be lawfully claimed. Where the master assaults a seaman, the latter may endeavor to escape; if pursued and escape be impossible, and the assault continued, he may use necessary and equivalent force for his own protection.

It should be remembered that the power of punishment on shipboard is vested in the master personally and that the law does not permit his delegating it to others. A mate has no legal right to enforce his orders by beating one of the crew. Up to about seventy years ago corporal punishment of seamen was permitted by law, owing to the nature and supposed necessities of the service, and no doubt officers find it hard to give it up. Courts of admiralty endeavor to deal with these cases in a practical way. Altercations and assaults between master and crew have never been treated by them like those redressed in the common law courts, where the slightest blow may be treated as a trespass to one's dignity and feelings of self-respect. The crew are to be protected from injury and the maritime law will amply vindicate all beatings, woundings and maltreatment, criminally and civilly. The right of self-defense is only a last resort and will seldom need to be invoked.

12. Lien for Wages.— The seamen have a maritime lien for their wages in preference over all other liens except for salvage. They are said to be the wards of the admiralty and it endeavors to see them paid over all other creditors of the ship. Thus the lien has priority over towage, claims for supplies and repairs, breach of contract, and port dues. It will not be superior to a lien for collision damage, if their negligence contributed to the disaster, at least as far as prior wages are concerned. Subsequent wages, earned in bringing the ship back to port, stand on a different footing.

This lien is said to inhere in the last plank of the ship and will be paid in preference to claims for penalties against the ship in behalf of the United States and port dues.

The lien for wages exists in the home port of the vessel as well as in foreign ports.

Where as sometimes in the case of a fishing voyage the crew has an interest in the result of the venture this does not affect the right to liens.

The weight of authority in the more recent decisions, reversing the older rule, is to give a lien to stevedores, longshoremen, watchmen and ship carpenters against foreign vessels (that is to say vessels not in the home port) while the authorities are in conflict as to whether such liens lie against domestic vessels.

The Merchant Marine Act of June 5, 1920, which is printed in full in the Appendix, §30, Subsection M, expressly confers a lien for wages of stevedores, "when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, and makes no distinction between the home port and any other.

In the *Ole Olson*, 20 Fed. 384, a schooner was libeled for seamen's wages and two men intervened and sought to recover who had been employed as stone-pickers by the master, who was also managing owner, to gather stone on the shores of Lake Michigan and assist in loading the stone on board as cargo to be carried to Chicago. While engaged in this service they lived and slept on the vessel as she lay off shore and when the weather was such that stone could not be gathered, the schooner would run into port and on such occasions these men would lend a hand in hoisting sail. They did not accompany the vessel on her voyages as she had a full crew without them. The only question was whether they rendered maritime services and were therefore entitled to the seaman's lien for wages. The Court held that they were not, distinguishing the *Ole Olson* from the case of the *Ocean Spray*, 4 Sawy. 105, and several others. In the case of the *Spray* the libellants were shipped as sealers and were hired to take seal for the vessel at a stipulated sum per month. Their contract also bound them "lend a hand on board whither they were wanted." On the voyage they helped make and reef sail, heave the anchor and clear decks, but did not stand watch. They also procured driftwood and water for the use of the vessel. They thus aided in the navigation and preservation of the vessel and were colabor-

ers in the leading purpose of the voyage. "Upon the principle applicable to surgeons, stewards, cooks and cabin boys (all of whom are entitled to the lien) they were to be considered as mariners." They were accordingly entitled to their maritime lien on the vessel.

13. Shipping Articles.—The law provides (U. S. Comp. St. §8300-8314) that the master of every vessel bound from a port in the United States to any foreign port overseas, or vice versa, shall make an agreement, in writing or in print, with each of the crew, containing particulars of the nature and duration of the voyage; the number and description of the crew; the time at which each is to be on board; the capacity in which each is to serve; the amount of wages which each is to receive; the scale of provisions which are to be furnished to each; any regulations as to conduct on board, fines, short allowances and other lawful punishments which may be agreed to; and any stipulations as to advances and allotments of wages, or other matters not contrary to law.

Sections 8287-8297 provide for the appointment of shipping-commissioners in such ports of entry and ports of ocean navigation as require them; where no commissioners are appointed, the collector of customs or his deputy may so act; the duties of such commissioners are to afford facilities for engaging seamen by keeping a register of their names and characters; to superintend their engagements and discharge according to law; to provide means for securing their presence on shipboard according to their engagements; to facilitate the making of apprenticeships to sea service and to perform such other duties relating to merchant seamen and merchant ships as may be required by law. Section 4554 amended by the Act of August 19, 1890, provides that the commissioners shall arbitrate disputes between owners or masters and the crew on mutual application.

Shipping articles should be in the printed form required by the statute and in common use; they should be signed by each seaman in the presence of a shipping commissioner, in duplicate, and one part retained by him; they should be acknowledged and certified under the commissioner's seal, to the effect that each understands what he has subscribed and, while sober, and not in a state of intoxication, acknowledges it as his free and voluntary act; the other duplicate should be delivered to the master and seamen subse-

quently engaging on the voyage should place their signatures thereon. The ship and also its officers are liable to penalties for shipping seamen without articles, but the requirement is excepted in the case of vessels engaged in the coasting trade and on the Great Lakes. When seamen are shipped in foreign ports where there is a consular officer of the United States or commercial agent, the master must obtain his sanction to the engagement, in substantially the same manner as in the case of a shipping commissioner at home. A copy of the articles, with the signatures omitted, must be posted on the vessel so as to be accessible to the crew, under penalty of one hundred dollars.

Shipping articles for vessels in the coasting trade, in less detailed forms, are required by §8311 and the master is made liable to a penalty of twenty dollars and the highest rate of wages for every seaman or apprentice carried without such an agreement. All shipments of seamen contrary to law are declared void; any seaman so shipped may leave the service at any time and recover either the highest rate of wages of the port from which he shipped or the sum agreed to be paid him when he went on board.

14. Wages and Effects.—Sections 8315-8337a of the Compiled Statutes of 1916 and the Merchant Marine Act of 1920 (see Appendix) codify the law in these respects. The right to wages and provisions commences when the sailor begins work or at the time specified in the shipping-articles, whichever happens first; the right is in no way dependent on the earning of freight; where the term of the hiring is cut short by loss or wreck of the vessel, the sailor is entitled to his wages up to that time but no longer; he is to be ranked as a destitute seaman and given transportation to the port of shipment according to law; in case of improper discharge before the commencement of the voyage or before one month's wages are earned, the sailor may have a sum equal in amount to one month's wages as extra compensation over what he may have earned; the right to wages is suspended during the time a seaman unlawfully refuses to work; on coasting voyages, wages must be paid within two days after the termination of the articles or upon discharge, whichever first happens; on foreign voyages, or between Atlantic and Pacific ports, within twenty-four hours after the cargo has been discharged, or within four days after the sailor has been laid off, whichever happens first; and in all cases he may have at least one-third of the balance due him

when he is discharged. Every master and owner who neglects to pay the sailor as required by law, without sufficient cause, must pay him double wages for every day during which payment is delayed beyond the periods mentioned.

Every sailor on an American vessel is entitled to receive from the master, at every port where the vessel loads or delivers cargo during the voyage, one-half his wages then earned; the demand, however, may not be made oftener than once in five days. Failure to so pay wages releases the seaman from his contract and foreign sailors in harbors of the United States may have the benefits of this provision.

It is unlawful to pay wages in advance, either to the sailor or to any other person on account of advances;¹ such payments constitute no defense to a subsequent suit. But a sailor may stipulate in the articles for an allotment to his grandparents, parents, wife, sister, or children, such allotment to be in writing and signed and approved by the commissioner.

Sailors' wages are not subject to an attachment or garnishment from any court and no prior assignment of wages or claim for salvage is valid.

¹ In *Sandberg v. McDonald*, 248 U. S. 185, the Supreme Court by a five to four decision, held that an advance made to a sailor before shipping on a British vessel, being lawful under British law, was properly deducted by the master in an American port from the one-half of earned wages demandable by the seaman in such port, notwithstanding such advance was unlawful under the American statute.

Going further at the same term of court and with the same dissent, the court held in *Neilson et al v. Rhine Shipping Co.*, 248 U. S. 205, that advances to seamen shipped on an American vessel in a foreign port were not prohibited by the statute. The effect of these two decisions was that the prohibition of advances to seamen upon their wages was confined to American ports, but the Merchant Marine Act of June 5, 1920 (see Appendix) provides that if an advance be made to a seaman in any port, whether foreign or domestic, he may nevertheless, recover the full wages earned by him, including any sum that may have been advanced to him. In other words he may recover the amount advanced over again. Such advances are prohibited in American ports whatever the nationality of the ship. On the other hand, the act is applicable to a vessel in an American port no matter what her nationality. Thus in a recent case of *Strathearn S. S. Co. v. Dillon*, decided March 29, 1920, the Supreme Court unanimously held that foreign seamen on foreign vessels in American ports are entitled to the benefits of the act and may demand one-half of the wages earned, notwithstanding contractual provisions to the contrary, and that the vessel need not have been in an American port five days before the seamen may make the wage demand. To entitle the seaman to make the demand it is only necessary that the vessel shall load or deliver cargo before the voyage is ended, and in the port where the demand is made; that the voyage shall have been commenced at least five days previously; that five days shall have lapsed since the last previous demand.

The effects of deceased seamen must be taken in charge by the master; if he thinks fit, he may cause them to be sold at auction at the mast or other public auction; if so, an entry must be made in the log book, signed by the master and attested by the mate and one of the crew, showing the amount of money belonging to the party in question; a description of each article sold and the sum received for each; and a statement of the balance of wages due. If the vessel proceeds to a port of the United States, the master must account to a shipping commissioner within forty-eight hours. If she touches at a foreign port first, he must report the case to the United States consular officer there and conform to his instructions. Failure to observe these requirements may subject the master to a treble liability for the value of the effects involved. Unclaimed proceeds of such effects, after six years, are converted into the Treasury of the United States and become a part of a fund for the relief of disabled seamen of the merchant marine.

15. Protection and Relief.—Sections 8343-8376 of the Compiled Statutes of 1916 contain numerous provisions for the protection and relief of sailors. Shipping commissioners are authorized to act as arbitrators on any question whatsoever between a master, consignee, agent or owner and any of the crew, if both parties agree in writing to submit it to him; his award is binding on both parties and any document under his hand and official seal purporting to be such, submission and award is *prima facie* evidence thereof; in any proceedings relating to wages, claims of discharge of sailors, the shipping commissioner has many of the powers of a court in regard to the examination of witnesses and production of documents.

Where complaint is made that a vessel is unseaworthy, the master must forthwith apply to the judge of the district court for the district in which the ship may be, or if such a judge is not available, to some justice of the peace, for the appointment of surveyors; three surveyors may be then appointed whose duty it will be to carefully examine the ship and report their findings to the judge, or justice; he shall thereupon decide whether the vessel is fit to proceed, or, if not, whether the necessary repairs should be made where she is lying or whether it is necessary for her to proceed to a port of repair; the master and the crew are bound to conform to the decision. The master must pay all the costs of such survey unless it is decided that the complaint was without

foundation; if so, the costs, to be ascertained by the judge or justice, and reasonable damages for the detention, are payable out of the wages of the parties who complain; if it be adjudged that the vessel is fit to proceed on her intended voyage, or if after the required repairs are made the sailors or any of them refuse to continue on board, their wages may be forfeited. Similar provisions obtain when the ship is in a foreign port; there the consul is authorized to appoint surveyors or inspectors; such inspectors in their report shall also state whether in their opinion the vessel was sent to sea in an unseaworthy condition by neglect or design, or through mistake or accident; if by neglect or design, and the consular officer approves such finding, he shall discharge such of the crew as requested and require payment by the master of one month's extra wages or sufficient money for the return of the crew to the nearest and most convenient port of the United States; if the defects are found to be the result of mistake or accident, and the master shall in a reasonable time remove or remedy the cause of complaint, then the crew must remain on board and discharge their duty. Sending or attempting to send an American ship to sea in such an unseaworthy state as to make it likely that the life of any person will be in danger is a misdemeanor punishable by a fine not to exceed \$1,000 or by imprisonment not to exceed five years, or both.

Should any master or owner neglect to provide a sufficient quantity of supplies for a voyage of ordinary duration to a port of destination, and thereby cause the crew to accept a reduced scale, he will be liable to penalties from fifty cents to one dollar a day to each sailor prejudiced thereby; any three or more of the crew of a vessel in deep-sea service may complain of the bad quality of the provisions or water and have a due examination made thereof, and if deficiency is found a master must remedy the same under a penalty of not more than \$100; every American vessel in ocean trade shall be provided with medicines and antiscorbutics; must keep on board appropriate weights and measures and be provided with at least one suit of woolen clothing for each seaman, and a safe and warm room for the use of seamen in cold weather; they must also be provided with a slop-chest containing a complement of clothing for the intended voyage for each seaman employed, including everything necessary for the wear of the sailor and a fair supply of tobacco and blankets; the contents of the

chest shall be sold from time to time to any and every sailor applying therefor for his own use at a profit not exceeding 10 per cent. of the reasonable wholesale value at the port of shipment.

The statutes also contain detailed provisions as to the numbers and qualifications of the crew for vessels of various sizes and waters; also as to ratings, examinations and certificates of service; also as to wages at sea and against undue or unnecessary labor on board; while vessels are in safe harbors no sailor can be required to do any unnecessary work on Sundays or holidays, and while in port nine hours constitute a day's work.

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CHAPTER VI

CARRIAGE BY SEA

The purpose of the ship is the carriage of goods and passengers and the earning of freight- and passenger-money. The underlying purpose of the maritime law is to facilitate these transactions and provide reciprocal rights for the parties engaged in them, hence the ship will have a lien on the cargo for its freight, demurrage and other charges; and, correspondingly the cargo will have a lien on the ship for any damages it may sustain by breach of the contracts of carriage. A ship is held to a high degree of care for the cargo and the cargo-owner must be prompt in his relations to the ship.

1. Common and Private Carriers.—The ship may be either a common or private carrier of goods or of passengers. In many respects carriage by water is only a subdivision of the general law of carriers and the more general principles apply as well to the ship as the railroad.

The common carrier is one who offers to carry for all who may choose to employ him. The private carrier is one who transports by virtue of a special agreement. The private carrier appears more frequently in water carriage than in land transportation. Most ships, for example, carrying bulk cargoes by special arrangement are private carriers. Most passenger ships are common carriers of passengers. Ships carrying miscellaneous or package freight, and running over regular routes, are common carriers. In general the distinction is by what they profess or offer to do,—whether to carry generally for the public, or only by special agreements.

2. Liabilities.—The liability of a private carrier may be more closely limited by agreement than that of common carrier, but in general it will be sufficient to consider his liability as that of a shipowner carrying goods for hire. That liability is practically very stringent; he is responsible for any damage to the goods in his charge unless he can show that it was occasioned by the act of

God or the public enemy, subject to two important statutes,—the Limited Liability Act (Rev. St. §§4282–4289, Act of June 26, 1884) elsewhere considered, and the Harter Act of February 13, 1893, 27 S. 445. Under this last mentioned statute, if the ship is actually seaworthy in all respects at the commencement of the voyage, there is no liability for losses sustained by faults or errors in her navigation or management. The general scope of the Act is to prohibit stipulations in the bill of lading which curtail the shipowner's liability for negligence in the proper loading, stowage, care or delivery of the cargo and to exempt him from the consequences of faults or errors in navigation or management if the ship was seaworthy when the voyage began. The word "management" does not include acts of preparing the ship for the voyage; and where she had reached her destination and sank while being discharged on account of her unstable condition and a broken coal port, the fault was held not to be one in her management.

3. **Seaworthiness.**—A warranty of seaworthiness underlies all the relations of ship and cargo. This means, primarily, that the vessel is responsible for loss or damage to the goods if she was not in a seaworthy condition when she commenced the voyage, and if the loss would not have arisen but for that unseaworthiness. This liability may frequently involve the owner personally, as when the defect is attributable to his own fault or want of care. He is held to warrant that she is fit to carry the cargo which she loads and with it to encounter safely whatever perils may be reasonably expected to ensue and assumes liability for any defects in hull, machinery or equipment, even if not discoverable by careful examination. The ship must be fit in design, structure, condition, and equipment to encounter the ordinary perils of the voyage. This includes a competent master and a sufficient crew. The test is, of course, a relative one and depends upon the facts and circumstances involved in each particular case. A ship may be perfectly seaworthy for a particular cargo and voyage and quite unseaworthy for another. It is frequently said that the warranty does not require an absolutely perfect ship and that the true criterion is that degree of fitness which the average prudent and careful owner requires of his vessel at the commencement of the voyage, having given due consideration to all the circumstances which may reasonably be anticipated to attend it.

In the case of the *Caledonia*, 157 U. S. 124, it appeared that the

vessel was chartered to transport cattle from Boston to Deptford, Sufficient fodder was provided for fifteen days, a longer period than the usual length of the voyage, being all the fodder customarily provided for such voyages. When nine days out from Boston in smooth water, the propeller shaft broke straight across in the stem tube. The breakage was due to weakening of the shaft in heavy seas on previous voyages. Its weakened and unfit condition existed when the vessel put to sea on the voyage under consideration, but the defect was invisible and could not have been detected by usual and reasonable means if the shaft had been taken out and examined. No negligence on the part of the owners was proven. Because of the breakage the voyage lasted twenty-five days and the cattle were put on short allowance of food. In consequence they were landed at Deptford in emaciated condition. They were sold in London on the first market day following their arrival. The shipper of the cattle sustained a loss due to their shrinkage in weight and to a fall in the market which occurred during the period of delay. Chief Justice Fuller in the opinion of the court reviewed many of the leading English and American cases, and held :

The proposition that the warranty of seaworthiness exists by implication in all contracts for sea-carriage, we do not understand to be denied; but it is insisted that the warranty is not absolute, and does not cover latent defects not ordinarily susceptible of detection. If this were so, the obligation resting on the shipowner would be, not that the ship should be fit, but, that he had honestly done his best to make her so. We cannot concur in this view.

In our opinion, the shipowner's undertaking is not merely that he will do and has done his best to make the ship fit, but that the ship is really fit to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage; and, this being so, that undertaking is not discharged because the want of fitness is the result of latent defects.

The warranty of seaworthiness implies that the vessel shall be fit for the particular service in which she is to engage. A vessel intended to be used in river navigation is not required to be made fit for ocean transportation. Taking into consideration the nature of the voyage, it has been said that :

She must be so tight that the water will not reach the cargo; so strong that these ordinary applications of external force will not spring a leak in her or sink her; so sound that she will safely carry

the cargo in bulk through these ordinary shocks to which she must every day be subjected. If she is capable of this, she is seaworthy; if she is not, she is unfit for the navigation of the river. (*The Keokuk, etc. v. Home Ins. Co.*, 9 Wall. 526.)

The opinion just quoted had reference to a barge in tow. The Court held that the barge was considered as belonging to the tug, which had her in tow, and that the warranty of seaworthiness extended to the barge equally with the tug.

While under the act of February 13, 1893, (27 St. at L. 445, *supra*) the owner is relieved of liability to the cargo by reason of faulty navigation, the employment of a competent master and crew is implied in a warranty of seaworthiness and the owner is liable under the warranty if he fail to employ a competent personnel. In other words the relief from liability occurs where the owner had employed competent men, but they negligently or faultily operated the ship. Thus Justice Clifford in *Germania Ins. Co. v. Lady Pike*, 21 Wall. 1, said:

(The vessel) must be provided with a crew adequate in number and competent for their duty with reference to all the exigencies of the intended route, and with a competent and skillful master, of sound judgment and discretion, and with sufficient knowledge of the route and experience in navigation to be able to perform in a proper manner all the ordinary duties required of him as master of the vessel.

4. **Loading and Stowage.**— These are done in accordance with the provisions of the contract of carriage or custom of the port at which the cargo is taken on board. Proper loading and stowage is an important element of seaworthiness of the ship. The cargo must be so disposed as to keep her trim and seaworthy and also so that one portion may not injure another. This work is frequently done by stevedores, whose services, when employed by the ship, are now recognized as maritime and secured by a lien on the vessel. They are, however, subject to the master's control and he is not to take on more cargo than he thinks the vessel can safely carry nor permit its stowage to interfere with the general safety of the adventure. He may refuse to take on more cargo than in his honest opinion is prudent, and must not permit any overloading at all. A fair test is the depth which the vessel was constructed to draw or that which the master and others of experience on the spot believed to be proper. The shipper of goods by sea must disclose

their real character and value. He is bound to know whether they have explosive or other dangerous qualities, and, if concealment has been practiced by him on the shipowner, he will be liable for all the damages sustained from their effects. In every shipment there is an implied warranty on the part of the shipper that his goods are not of a character to cause injury to other goods on board, unless otherwise specially stipulated, and he is held liable for all the consequences of its breach; if the carrier has thereby been obliged to compensate other shippers, he may recover over against the delinquent what he was so compelled to pay.

In the case of *Barker v. The Swallow*, 44 Fed. 771, a small steamer, in use in the lumber trade on the Great Lakes, took a cargo of pine boards, laden as usual on deck. She encountered a strong wind and heavy sea, causing her to roll badly so that a portion of the lumber slid off the starboard side and another portion off the port side as the vessel careened in either direction. It was conceded that it was not the usage to lash deck loads of lumber vessels with ropes or chains, but with ordinary safe loading the boards would be held in place by the frictional contact of their surfaces under the weather conditions ordinarily encountered on Lake Michigan. The libellant (owner of the lumber) contended that too much lumber had been loaded upon the deck and thereby made her top-heavy, and caused her to roll more than she would have done had she not been overloaded on deck, and that the rough weather encountered did not amount to a "tempest." The Court held

while a vessel is not liable for the loss of her deck-load when it is lost by stress of weather, or what can be properly called "a peril of the sea," yet, if she takes on so heavy a deck-load as to become top-heavy, and endangers loss of the deck-load, or puts it in peril in an ordinary wind, or anything less than a gale of wind, or such stress of weather as is clearly unusual, it should, I think, be accounted bad stowage and negligence. Overloading the vessel so as to render her unmanageable, or susceptible of becoming unmanageable, by such a wind as is shown to have prevailed on the night in question, is, I think, a manifest negligence on the part of the carrier, and such as should not acquit him of liability if the cargo is lost.

In this case there was testimony that the vessel had carried much heavier deck cargo in safety, but the Court considered that this proved no more than her good luck.

Where the particular method of stowage is determined by the

shipper, and damage results, the vessel is not liable for damage to cargo so stowed. A distinction is also to be noted between under-deck cargo and cargo stowed on deck. These principles are illustrated by the case of *Lawrence v. Minturn*, 17 How. (U. S.) 100. In that case certain boilers and chimneys were shipped aboard the *Hornet* and stowed on deck with the consent of their owner. The vessel encountered bad weather and began to roll gunwale deep, shipping large quantities of water, opening seams and endangering the safety of the underdeck cargo, as well as the lives of those on board. After consultation with his officers and members of the crew the master lightened ship by throwing overboard the deck cargo. The owner of the boilers and chimneys libeled the ship. In directing the libel to be dismissed the Supreme Court said:

It was strongly urged by the libellant's counsel that the shipper could not be supposed to have, and should not suffer for not possessing, a knowledge of the capacity or sufficiency of the ship; that the carrier was bound to know that the instrument, by which he agreed to perform a particular service, was sufficient for that service; and that, as these carriers contracted to convey this deck-load to San Francisco, they were obliged to ascertain whether placing it on deck would overload their vessel. This appears to have been the ground on which the court below rested its decree.

This reasoning would be quite unanswerable if applied to a shipment of cargo under deck, or to its being laden on deck without the consent of the merchant, or to a contract in which perils of the sea was not excepted. But the maritime codes and writers have recognized the distinction between cargo placed on deck, with the consent of the shipper, and cargo underdeck.

There is not one of them which gives a recourse against the master, the vessel, or the owners, if the property lost had been placed on deck with the consent of the owner; . . .

The carrier does not contract that a deck-load shall not embarrass the navigation of the vessel in a storm or that it shall not cause her so to roll and labor in a heavy sea as to strain and endanger the vessel. In short, he does not warrant the sufficiency of his vessel, if otherwise staunch and seaworthy to withstand an extraordinary action of the sea when thus laden. If the vessel is in itself staunch and seaworthy, and her inability to resist a storm arises solely from the position of a part of the cargo on her deck, the owner of the cargo who has consented to this mode of shipment, cannot recover from the ship or its owners, on the ground of negligence or breach of an implied contract respecting seaworthiness . . .

The master is bound to use due diligence and skill in stowing and

staying the cargo; but there is no absolute warranty that what is done shall prove sufficient.

In this connection, however, it should be noted that the foregoing decision has not been interpreted to mean that where a shipper assumes the risk of deck cargo he thereby bargains away his right to recover for loss of such cargo if the ship were inherently incapable of carrying it. Thus the court in the *Royal Sceptre*, 187 Fed. 224, where the shipper himself was the charterer and loaded the cargo on deck, said:

Pressed to its logical limit, the untenable nature of the argument seems very plain; for if a vessel can become unseaworthy by piling up deckload, without any liability to the owner of the same, she may capsize as soon as her fasts are thrown off. Deck cargo at shipper's risk does not mean such absolute surrender of all rights. The risk assumed presupposes proper loading for deck stowage and a seaworthy ship. It is not thought that *Lawrence v. Minturn* asserts any doctrine opposed to this. It speaks only of a jettison; while, if even a jettison be rendered necessary by unseaworthiness *existing at commencement of voyage*, the ship is liable, as is shown by the summary of decisions given in *Compania De Navigacion la Flecha v. Brauer*, 168 U. S. 120, 121.

5. Wreck or Stranding.—Shipwreck or disaster does not affect the title of the owners of the cargo but the goods themselves may become subject to superior liens for salvage and general average.¹ If the voyage is broken up the owner may take his property wherever he can find it, subject to such maritime liens as may have lawfully accrued and, also, in some cases, to a claim for freight in proportion to the part of the voyage which has been performed. In the absence of the owners, the master is the agent of all concerned and has as much authority as the necessities of the situation require.

In practice almost all matters growing out of a disaster are dealt with by the underwriters. Cargoes are seldom uninsured. The owner should promptly notify his insurers or brokers and tender an abandonment and the underwriters will attend to the situation which develops. If the abandonment be accepted, the shipper receives the insured value of his goods and the insurers stand in his stead as owners. The policy will also ordinarily protect against the loss if less than total and cover all charges for

¹ See p. 181.

salvage, general average, and warehousing to which the property may be subjected. The shipper and his representatives are entitled to a copy of the master's protest and all other information in regard to the disaster and also to be consulted in regard to operations for the release of the ship and cargo if they so desire.

6. Arrival and Discharge.— It is the duty of the consignee of the cargo, apart from local custom or special contract, to be reasonably diligent to ascertain when the ship arrives with his goods on board and the master is not bound to seek him out and notify him.² He should, however, report at the Custom House or make such other public notification of arrival as is usual in the port. If the consignee does not appear to claim and receive his goods, the master may land and warehouse them at his expense. The master is bound to deliver the goods to the right person, that is, the person entitled to them as owner or as holder of the bill of lading and all outstanding bills of lading should be taken up. They are quasi-negotiable, and, in the hands of third parties, may become the basis of a claim for the goods.

The consignee, producing a proper bill of lading, is, of course, entitled to inspect the goods before accepting them and the ship must afford him the opportunity even if the instructions be not to deliver them until paid for. If damaged, he may decline to receive them, but if he accepts he should closely observe the provisions of his contract in regard to notice and claim for damages. Most bills of lading contain provisions limiting the time within which claims may be made and these, when explicit, are enforced by the courts. Failure to present a claim in accordance with such stipulations will usually exonerate the carrier even if the damage was occasioned by his fault or negligence.

This subject is fully discussed by the Supreme Court in the case of *Constable v. National Steamship Co.*, 154 U. S. 51. The *S. S. Egypt* arrived at New York from Liverpool at 1.45 P. M. and there being no room for her at her owner's pier, was taken to the pier of the Inman Company, where she was unladen, pursuant to a permit issued by the Collector of Customs whereby the cargo was allowed to remain on the wharf for forty-eight hours upon agreement by the owners of the ship that the goods should be at

² Prior to the advent of steam navigation this was not the rule. A carrier, in order to discharge his liability, was obliged to deliver the cargo upon the usual wharf of the vessel, and give actual notice to the consignee, if he were known.

the sole risk of the owners of the ship who would pay the consignees the value of such cargo as might be stolen, burned or otherwise lost. Notice of the time and place of discharge was then posted upon the bulletin board of the Custom House in accordance with the usual practice, but no notice was sent to the consignee, nor did he have actual notice or knowledge of the arrival and unloading of the vessel. On the night of the day of the arrival the goods were burned on the pier upon which they had been unladen without negligence on the part of the owners of the *Egypt*. The bill of lading contained this provision :

The goods to be taken alongside by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed by the master and deposited at the expense of the consignee, and at his risk of fire, loss or injury in the warehouse provided for that purpose or in a public store as the Collector of the Port of New York shall direct . . . The United States Treasury having given permission for goods to remain forty-eight hours on wharf at New York, any goods so left by consignee will be at his or their risk of fire, loss or injury.

The Court (Brown, J.) held :

1. That the stipulation in the bill of lading that respondent should not be liable for a fire, happening after unloading cargo was reasonable and valid.
2. That the discharge of the cargo at the Inman pier, was not in the eye of the law a deviation such as to render the carrier and insurer of the goods so unladen.
3. That if any notice of such unloading was required at all, the bulletin posted in the Custom House was sufficient under the practice and usages of the port of New York.
4. That libellants, having taken no steps upon the faith of the cargo being unladen at respondent's pier, were not prejudiced by the change.
5. That the agreement of the respondent with the Collector of Customs to pay the consignees the value of the goods was not one of which the libellants could avail themselves as adding to the obligations of their contracts with the respondents.

7. **Freight and Demurrage.**— Freight is the price of transportation by sea and demurrage has been called a kind of extended freight but is more generally understood as the price of delay in loading or receiving the cargo on the part of the shipper or consignee. Freight must be earned by conveyance and delivery of the cargo but the ship is entitled to hold the goods until payment is made. The contract of affreightment is very succinctly described by Lord Ellenborough, in *Hunter v. Prinsep*, 10 East 378:

The shipowners undertake that they will carry the goods to the place of destination, unless prevented by the dangers of the seas, or other unavoidable casualties; and the freighter undertakes that if the goods be delivered at the place of their destination he will pay the stipulated freight; but it was only in that event, viz., of their delivery at the place of destination, that he, the freighter, engages to pay anything. If the ship be disabled from completing her voyage, the shipowner may still entitle himself to the whole freight, by forwarding the goods by some other means to the place of destination; but he has no right to any freight if they be not so forwarded; unless the forwarding them be dispensed with, or unless there be some new bargain upon this subject. If the shipowner will not forward them, the freighter is entitled to them without paying anything. One party, therefore, if he forward them, or be prevented or discharged from doing so, is entitled to his whole freight; and the other, if there be a refusal to forward them, is entitled to have them without paying any freight at all. The general property in the goods is in the freighter; the shipowner has no right to withhold the possession from him, unless he has either earned his freight, or is going to earn it. If no freight be earned and he decline proceeding to earn any, the freighter has a right to the possession.

Where a ship does not "break ground," that is to say, does not commence her voyage at all, as in the case of the *Tornado*, 108 U. S. 342, in which it appeared that the vessel was destroyed by fire before sailing, the contract of affreightment is dissolved, or does not become effective, and the shipper cannot recover freight which she did not even begin to earn.

The lien for freight is a qualified one and will be lost by an unconditional delivery. The same is true of demurrage but the personal liability of the shipper or consignee will, of course, remain. The amount of freight is usually fixed by agreement and specified in the bill of lading.

So, also, are clauses in regard to demurrage. Strictly speaking, the latter can only be recovered where it is expressly reserved in the contract of carriage, but, where such stipulations have been omitted, the same result is sometimes obtained by an action for damages in the nature of demurrage on account of wrongful detention of the ship. The question of whether the ship has been unreasonably delayed or wrongfully detained is often a very confused one and its solution depends to a great extent on the surrounding circumstances. When emergency demands prevail and ports are crowded, the ship assumes some of the incidental risks of delay in obtaining and discharging her cargo, and, unless the

contract is plain, can hardly insist upon more than the same treatment as others in similar situations are obtaining. When disputes arise, neither party should press his position to the extent of causing further delay, as by withholding or refusing the goods. Admiralty practice abounds in opportunities to prevent unnecessary delay by bonds or stipulations and the parties should take advantage of these or risk the disfavor of the court in which their litigation proceeds.

8. Unfair Freight Rates.—The Merchant Marine Act of June 5, 1920 (see Appendix), forbids and makes a misdemeanor the allowance of deferred rebate of freight to any shipper; the use of fighting ships, *i. e.*, vessels used for reducing competition by driving any carrier out of the trade; retaliation against other shippers by refusal of space accommodations when the same are available, and the making of any unjustly discriminatory contract with any shipper based on the volume of goods offered, or the making of any unjustly discriminatory charge against any shipper in the matter of accommodations, loading and landing or settlement of claims. The Shipping Board is authorized to investigate alleged violations of these provisions and the Secretary of Commerce is directed to refuse the right of entry to any ship owned or operated by a carrier whom the Shipping Board has found to be guilty of such violations.

9. Passengers.—The carriage of passengers by water is regulated by substantially the same rules in regard to fares, tickets, special contracts and baggage as carriage by land.

The passenger is entitled to a reasonable amount of baggage having regard to his station in life and the character of the journey. As to articles which he retains in his personal custody the carrier is not an insurer but is liable only for negligence; the mere fact of loss creates no presumption against the carrier (*Clark v. Burns*, 118 Mass. 275). The carrier is liable for articles stolen from the passenger by its employees (*Minnetonka*, 146 Fed. 509) and the conditions and limitations as to value of baggage usually printed on the tickets are of slight value in the courts (*Majestic*, 166 U. S. 375).

10. Reciprocal Duties.—The real differences between rules of law applicable to land and sea travel result from their own peculiar circumstances. Thus, the relation of passenger and ship necessarily implies something more than mere ship room and per-

sonal existence on board. For the time being the ship's company and the passengers constitute a community by themselves and remote from the rest of the world. There must be a certain amount of mutual toleration and concession. The situation requires, indeed, not mere toleration but respectful treatment,—“That decency in demeanor which constitutes the charm of social life, that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress.” (*Chamberlain v. Chandler*, 3 Mason 242; *Western States*, 151 Fed. 929.) The passengers must be prepared to submit on proper occasions to the authority of the master, which may, indeed, occasionally become despotic where the safety of the ship is involved. He may compel passengers to work at the pumps, for example, in the face of actual danger (1 *Parsons' Shipping and Admiralty*, 637) or even to risk their lives if the common safety requires it (*Boyce v. Bayliffe*, 1 *Campbell*, 58). Of course this power must be judiciously exercised and if it is overstepped the law will afford redress. The old case of *Prendergast v. Compton*, 8 C. & P. 454, is illustrative; the defendant was master of a ship from Madras for London, in the days when long voyages around the Cape were common. The plaintiff was a passenger whose table manners were distasteful to the other members of the master's table; he first attempted to correct them by mild suggestions and remonstrances, but the plaintiff responded by threatening to cane the master, who thereupon excluded him from the cabin and otherwise subjected him to discipline during the voyage. On arrival in port the plaintiff brought this action and the case affords an interesting discussion of the subject; the question was finally left to a jury who concluded that the master had exceeded his authority and allowed the plaintiff twenty-five pounds as damages.

The maritime law required a high degree of care for the protection of the passenger from personal injury. A ship must answer for such damages as might have been avoided by the exercise of unusual diligence and extraordinary skill. Although not technically an insurer, a presumption against a ship will be heavy in such cases, and ordinarily damages will follow unless it can be shown that the injury was entirely due to the passenger's own fault.³

³ See § 2, this chapter, *infra*.

11. Baggage.—Passengers' baggage or luggage is in, substantially, the same class as cargo as far as the liability of the ship is concerned. Some cases have held that there was an exception of property which the passenger retained in his own custody but the general rule is that this only relieves the carrier where the passenger's own negligence occasioned the loss; in such cases the passenger must show that the shipowner failed to exercise reasonable and proper care. The matter is frequently covered by express stipulations in the ticket or contract of carriage but these will not usually be enforced in the American courts unless reasonable and plainly agreed to by the passenger. Thus arbitrary limitations of the value of the baggage of a steamship passenger are void. Passengers' baggage is not limited to wearing apparel and similar articles, although the general rule is that it must be confined to such articles as are reasonably required for the purposes of the journey, having in mind its general scope and the station and circumstances of the passenger. It is not permitted to impose extraordinary liabilities upon the ship by carrying as baggage goods of great value which should be otherwise shipped. In a recent case recovery was allowed for the loss of a manuscript of a manual on Greek grammar contained in the passenger's trunk; he valued it at \$5,000; the Court, however, allowed only \$500, on the theory that it was an imposition on the carrier to place so valuable an original in his baggage when he might have carried an equally serviceable copy.

12. Personal Injuries.—Passenger carriers by water are subject to the same general liabilities of carriers by land. The highest degree of care for the safety of the passenger is required of the ship and negligence is presumed where an injury is sustained on board. It is the duty of the vessel to protect its passengers from harm by reason of defects in construction or acts of the ship's company or other passengers. Actions for damages may be brought against the ship or the owner. An injured passenger is entitled to at least the same degree of care and attention that a member of the crew is and may have an additional claim if this is neglected. The cases exhibit a wide range of injuries on ship-board for which recoveries have been allowed; thus, where a sailor carelessly fell from the foretopmast upon a passenger, a libel was sustained; so where a passenger was thrown from his berth by the pitching of the ship in a storm, through absence of a

protecting board; so for failure to accord to a passenger respectful treatment by the officers and crew; for failure properly to protect exposed parts of machinery and openings in the deck; failure to provide a sufficient supply of wholesome food; furnishing unsanitary drinking water; and, indeed, for the negligence of those conveying passengers to and from the ship or on excursion trips on shore when advertised as a part of the voyage in question. The ship is required to have a doctor on board for the care of passengers but, when due care has been exercised in his selection, there is no liability for his mistakes or negligence in his professional work.

Cases abound illustrative of these principles. For example the old cases of *Behrens v. Furnessia*, 35 Fed. 798, and the *City of Panama*, 101 U. S. 453, in both of which passengers were injured by falling down open hatchways, which were customarily kept closed, and the more modern case of *Dempster Shipping Co. v. Pouppirt*, 125 Fed. 732, where the plaintiff while on deck was struck by a beam which was being thrown overboard. In the two cases first mentioned plaintiffs recovered damages, it being considered that under the circumstances the ship was negligent in leaving open and unguarded hatchways which were customarily kept closed and over which passengers were accustomed to pass. In the case last cited plaintiff failed to recover because it appeared that he had voluntarily placed himself in dangerous proximity to boards that were being swung over the side. The law is quite fully reviewed in these cases. In the *City of Panama*, it was said:

Owners of vessels, engaged in carrying passengers, assume obligations somewhat different from those whose vessels are employed as common carriers of merchandise. Obligations of the kind in the former case are, in some few respects, less extensive and more qualified than in the latter, as the owners of the vessel carrying passengers are not insurers of the lives of their passengers, nor even of their safety; but in most other respects the obligations assumed are equally comprehensive and even more stringent . . .

Passengers must take the risk incident to the mode of travel which they select, but those risks in the legal sense are only such as the utmost care, skill and caution of the carrier, in the preparation and management of the means of conveyance are unable to avert.

In the case of *Shipping Co. v. Pouppirt*, the court quoted with approval the following language from *Railway Co. v. Myers*, 80 Fed. 361:

If a passenger of mature age leaves the place which he knows has been provided for him, and, without any occasion for so doing, or to gratify his curiosity, goes to another, where the dangers are greater, or places himself in a dangerous attitude, which he was not intended to assume, or if he disobeys any reasonable regulation of the carrier, it should be held that he assumes whatever increased risk of injury is incurred in so doing.

13. Loss of Life.— Until March 30, 1920, the general maritime law did not give any right to recover for loss of life. On that date an act of Congress was approved, the text of which follows:

That whenever the death of a person shall be caused by wrongful act, neglect or default occurring on the high seas beyond a marine league from the shores of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representatives of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

Sec. 2. That the recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

Sec. 3. That such suit shall be begun within two years from the date of such wrongful act, neglect, or default, unless during that period there has not been reasonable opportunity for securing jurisdiction of the vessel, person or corporation sought to be charged; but after the expiration of such period of two years the right of action hereby given shall not be deemed to have lapsed until ninety days after a reasonable opportunity to secure jurisdiction has offered.

Sec. 4. That whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default, occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

Sec. 5. That, if a person die as the result of such wrongful act, neglect, or default as is mentioned in section 1 during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this Act for the recovery of the compensation provided in section 2.

Sec. 6. That in suits under this Act the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly.

Sec. 7. That the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act. Nor shall this Act apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

Sec. 8. That this Act shall not affect any pending suit, action, or proceeding.

It will be observed that this act places loss of life on the high seas in the same category as personal injuries. The suit is to be brought by the personal representative of the decedent for the benefit of the decedent's wife, husband, parent, child or dependent relative. It would appear that if there are no such persons an action could not be maintained. This would seem to exclude a right of action where the decedent leaves only creditors or heirs of more remote degree than those enumerated. Nearly all the states have statutes providing for recovery on account of loss of life at sea and these statutes have hitherto been enforced in the admiralty courts. Section 7 provides that the federal act shall not affect rights of action or remedies for death provided by state laws. The act is broad enough in terms to include a right of action for the death of seamen, but there is another statute covering such cases (see Chapter V, § 6, *supra*).

The act does not affect the right of the owners of a ship to limit their liability. Claims for loss of life when properly *payable* under the act would apparently be included among claims to be paid out of the limited liability.

The act does not enlarge the responsibility of the owners. Whether they are responsible *in personam*, or whether the vessel is solely responsible *in rem* depends on the privity or knowledge of the owner, as discussed in Chapter VIII, § 9 *infra*.

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CHAPTER VII

CONTRACTS OF AFFREIGHTMENT, BILLS OF LADING AND CHARTER PARTIES

1. Definitions.— Contracts of affreightment are for the carriage of goods in vessels. This definition is sufficiently comprehensive to include contracts evidenced by bills of lading and charter parties. In practice the expression, "contracts of affreightment," is commonly used in a somewhat narrower sense to indicate those cases in which a vessel is operated by her owners on their own account, contracting directly with the shippers.

A bill of lading is the document issued for carriage of goods which form only a part of the cargo; it is both a receipt and a contract of carriage.

A charter party is a contract in writing by which the shipowner lets the ship in whole or in part. It corresponds to a lease of lands or buildings. The name comes from the fact that it was formerly prepared on a card which was then cut into two parts from top to bottom (*carta partita*) and each of the parties retained one for production when required and thus prevented counterfeiting.

By an order dated October 1, 1920, made pursuant to the provisions of the Merchant Marine Act (see Appendix), the Shipping Board requires two certified copies of every charter or contract of affreightment made on American or foreign steam or sailing vessels leaving continental United States to be filed with the Chartering Executive Committee, 45 Broadway, New York, which will then issue a certificate of filing. Unless this is done, clearance will be refused the vessel; but where there is not time to file certified copies before sailing, a letter or telegram to the Committee, giving all details of the contract, will answer the purpose. General cargo and passenger vessels, those in ballast and those carrying cargo for owners are not subject to this regulation.

Freight is the price of the carriage of goods by sea under a bill of lading, and also the sum agreed on for the hire of the ship under a charter party.

Before discussing the particular features of these contracts it will be well to observe certain elements which enter into substantially all contracts for the carriage of goods for hire. These are the warranty of seaworthiness, the obligation against deviation and the exemption of the carrier from liability on account of the perils of the sea.

In the Chapter, "Liabilities and Limitations," §10, will be found a discussion of the Harter Act. This must be taken into consideration in connection with these subjects.

2. **Seaworthiness.**—The warranty of seaworthiness underlies all contracts between the vessel and the shipper. It is an implied warranty on the part of the owner that the vessel is seaworthy, and sufficient for the use to which she is to be devoted. This warranty may be modified between the parties as they see fit by express agreement or necessary implication; a man may hire an unseaworthy boat and agree to put her in good condition; a charterer who examines and accepts a ship whose condition is defective cannot complain of an injury to the cargo caused by such defects. Otherwise the warranty subsists and the charterer cannot be held liable to the owner for depreciation in the ship resulting from unseaworthiness and has also the right to cancel the charter on the same ground. He may also hold the owner for such damages as he is obliged to pay third parties on account of unseaworthiness. This warranty, unless restricted by agreement, extends to latent or hidden defects, since it requires that the ship be seaworthy at the commencement of the voyage and is not satisfied by the fact that the shipowner does not know her to be unseaworthy or has used his best efforts to make her seaworthy. It runs up to the time she breaks ground for the voyage, but is modified by the results of subsequent excepted perils until it is reasonably practicable to repair them.

In *Bowring v. Thebaud*, 56 Fed. 520, it was held:

The shipowner in every contract of affreightment impliedly engages with the shipper of the goods that his ship on the commencement of her voyage is seaworthy for that voyage and supplied with a competent crew.

And the following statement of the law, from Carver on *Carriage by Sea*, was approved:

The warranty of seaworthiness for a voyage must be satisfied at

the time of sailing with the cargo. It is not sufficient that the ship was fit for the voyage while the cargo was being taken on, if she became unfit before she started. The warranty in truth appears to be a double one, viz., that the ship shall be fit to receive the cargo when receiving it and shall be fit to sail at the time of sailing.

The Court proceeded:

The warranty that the vessel is tight and fit for the employment for which she is offered,—that is, for the contemplated voyage on which she is to carry cargo,—is the very foundation and substratum of the contract of charter. The exception in a charter party as to dangers of the seas and navigation is not applicable to the perils and dangers which arise from the breach of the owner's obligation. Consequently it does not apply to the warranty of seaworthiness. Undoubtedly in cases where, under the language of the charter party, the warranty is satisfied if the vessel is seaworthy at the commencement of a voyage preliminary to her being laden, the shipowner is relieved by the exception from liability for any peril of the seas or navigation which are subsequently encountered without fault or negligence on his part . . . In all of these adjudications, the question was as to the meaning of the contract of the parties. This must be decided in each case by applying the rules of interpretation to the contract on hand.

3. **Deviation.**—The ship must cover the proposed voyage without deviation. Deviation is defined to be “a voluntary departure without necessity or reasonable cause, from the regular and usual course of a voyage” (*Hostetter v. Park*, 137 U. S. 30). Deviation makes the carrier liable for losses occasioned thereby as an insurer notwithstanding any limitation of liability in the contract of carriage. It may be excused for the purpose of saving life or avoiding perils if the master acts in accordance with sound judgment, and it is excused if it be the custom of the trade to put in at a particular port on similar voyages. The consignee, if he intends to insist upon the deviation as a defense to his liability for freight, should refuse to receive the cargo.

An instructive discussion of the rule with regard to deviation is found in the case of the *Indrapura*, 171 Fed. 929, where a vessel bound from Hong Kong to Portland, Oregon, was placed on a drydock at Hong Kong without maritime necessity and there caught fire, whereby the cargo was injured. The owners of the cargo libeled the ship for their damages, alleging that the unnecessary docking of the ship was a deviation. The Court said:

The term “deviation” in the law of shipping has at the present day

a varied meaning and wide significance. It was originally employed no doubt, for the purpose its lexicographical definition implies, namely, to express the wandering or straying of a vessel from the customary course of voyage; but it seems now to comprehend in general every conduct of a ship or other vehicle used in commerce tending to vary or increase the risk incident to a shipment. Thus delay in starting a shipment when unreasonable or unexcused came to be regarded as a deviation, not because the vehicle employed departed from the usual route of travel, but because the risk of shipment was changed or increased, and became, in effect, not the same as the one with reference to which the parties contracted.

And in *Bulkley v. Insurance Co.*, Fed. Cas. No. 2,118, it was said:

The shortness of time or distance of deviation is immaterial if voluntary and without necessity, and not justified by usage.

The contract of carriage frequently purports to give the ship liberty to make deviation. This is construed strictly against the owner of the vessel. She may make only "reasonable deviation." She may call at a port lying directly on the route of her voyage, but may not go out of her way to any considerable degree, and if she does so and the shipper is damaged the exemption will not avail to protect her owner.

4. Perils of the Sea.—Almost every contract in respect of employment of the ship contains an express or implied exception of perils of the seas. This provides an exemption of liability on account of losses caused by these perils. These casualties cannot be accurately defined. The expression denotes accidents peculiarly incident to navigation, whether on lake, river, or the deep sea, not attributable to any human agency or intervention. It is rather more comprehensive than the "acts of God," but by no means includes all the dangers which may occur while journeying on the sea. Collision is a peril of the sea if it occurs without fault of either ship but not if by reason of the negligence of the carrying ship. Tempests, rocks, shoals, icebergs and other obstacles are within the expression; so are incursions of sea water, which damage the goods, as well as such bad weather as prevents ordinary ventilation and causes the cargo to heat and sweat. Where the peril is the proximate cause of the loss, the shipowner is excused.

5. Fire.—Sec. 4282, U. S. Rev. St., is as follows:

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on

board the vessel, unless such fire is caused by the design or neglect of such owner.

It will be noticed that while this statute provides complete protection against fire on shipboard it does not protect against liability for damage by fire occurring on shore. To cover this it is common to insert in the contract of carriage an exemption from loss "before loading in the ship or after unloading." Such an exception is upheld by the courts where fire is not attributable to the neglect of the owner of the ship. Such a case was that of *Constable v. National Steamship Co.*, 154 U. S. 51, where goods were delivered on the pier of the Steamship Company and injured by fire before they were laden. The Court held that the clause in the bill of lading, excepting loss by fire "before loading in the ship or after unloading," was a valid defense.

6. Restraint of Princes.—The contract usually contains a provision exempting the shipowner from liability for damage due to "restraint of princes." This quaint phrase means any kind of governmental action which interrupts the voyage, or otherwise prevents the performance of the contract. These restraints occur most often during war, although they may happen in time of peace, as in the case of detention in quarantine. If the restraint results from some action taken by the shipowner, such as the taking on of contraband goods, the clause will not relieve him from liability.

A simple illustration of the restraint of princes clause appears in *Allanwilde Transport Corp. v. Vacuum Co.*, 248 U. S. 377, where a sailing vessel, the *Allanwilde*, was chartered to the libellants for the transportation of a cargo of oil and nails to Rochefort, France. The freight was prepaid. She started on the voyage and while she was at sea the government prohibited sailing vessels departing from the United States on voyages which would carry them through the war zone. The vessel ran into bad weather and was obliged to put back to the United States for repairs. By reason of the governmental order she did not resume her voyage. The owners of the cargo libeled the vessel to recover the prepaid freight. They also presented a claim for damages. The Court held that the restraint of princes clause of the charter party was a valid defense to the suit. Thus the vessel retained the freight which had been prepaid, although the voyage did not take place, and the cargo-owners did not recover their damages.

7. Freight.—(a) *Dead Freight.*—In case the charter party provides for the shipment of a full cargo by the charterer and compensation to the owner of the ship is payable per unit of cargo, the shipowner will be entitled to recover from the charterer the amount of freight which would have been payable by so much cargo as could have occupied the space left vacant. This is called dead freight.

On the other hand cases arise in which the owner has to pay dead freight to the charterers. This occurs where the compensation for the ship is a lump sum and the owner fails to load a full cargo.

(b) *When Freight is Earned.*—Freight is earned when the goods have been carried to their destination and not until then. If it be paid in advance and the goods do not arrive at destination it must be refunded. Of course, the parties may by their express stipulations in charter parties, bills of lading and other forms of agreement change these rules, and frequently do so. For example it is sometimes provided that prepaid freight shall be considered earned on the shipment of the goods, or if the ship be lost the freight shall not be refunded. Such bargains are, of course, entirely legal and will be enforced by the courts according to their tenor.

Charters sometimes provide for the carrying of cargo out and back. Here the terms of the contract with reference to the outbound and homeward-bound voyage are inseparable. No freight is earned until the ship returns with the homeward-bound cargo. But if the contract can be construed so as to regard each voyage separately, the freight for the outbound voyage will be earned at destination whether the ship returns with cargo or not.

8. Contracts of Affreightment.—Where the contract is not plainly a demise of the ship, i.e., a conveyance which turns over her full operation and control, it will not be so interpreted, and the owner will be in a position of a carrier of goods or as himself contracting for such other service by the ship as the charter requires, that is to say, the contract is one of affreightment.

Thus in *Hagar v. Clark*, 78 N. Y. 45, it was held:

If it remains doubtful whether the charterers were to have sole possession and control of the vessel during the voyage or were to be constituted owners *pro hac vice*, then the general owners must be deemed such for their rights and authority continue until displaced

by some clear and definite transfer of them. The legal presumption is in favor of continuance of ownership and against any transfer of the ship to the charterer for the voyage, and is said to be so strong that, if the end sought to be effected by the charter party can conveniently be accomplished without the transfer of the vessel to the charterers, courts of justice are not inclined to regard the contract as a demise of the ship, although there may be express words of grant in the formal part of the instrument.

The master remains the agent of the owner under any contract falling short of a demise, and the owner is bound by all his acts and omissions within the scope of his authority as in the ordinary relation of carriage by sea. If the instrument amounts to a demise, the master is the charterer's agent, and not that of the owner. Bills of lading or other contracts of affreightment signed by the master bind the owner or the owner *pro hac vice* on the theory of the master's agency. This subject is discussed in the case of *Freeman*, 18 How. 182, quoted extensively in Chapter III, § 10, *supra*. Charter parties frequently contain a clause whereby the charterer agrees to indemnify the shipowner against any liability arising from the signature of bills of lading by the master. Probably this clause would be implied in a charter party if not expressed therein. This gives the owner of the ship a right of action over against the charterer on account of any liability to which the shipowner or ship may have been subjected at the hands of the shipper. Thus if the charter party contained covenants for the protection of the shipowner under certain circumstances and the bill of lading issued by the master did not contain these restrictions and the shipper recovered under the bill of lading against the ship or her owner, the latter in turn could recover against the charterer (*Field Line v. South Atlantic Co.*, 201 Fed. 301).

9. Bills of Lading.—The forms differ greatly in contents and legal effect but have the common features of an acknowledgment of the receipt of the goods; a description by which they may be identified; an agreement to carry to destination and deliver; the rate of freight and an exception of certain perils. In addition to these features it has been usual to include more or less elaborate provisions tending to a diminution or limitation of the ship's liability, sometimes extended to great length in small or illegible type, and the attempt to take advantage of these is sometimes described as "fine print and coarse work." These stipulations, in

so far as they attempt to exempt the shipowner from the consequences of his own or his servants' negligence are not enforced in courts of the United States on grounds of public policy. They probably, however, have some value as deterrents of claims and litigation but should be studied in connection with the Harter Act (7 Comp. St. §§ 8029-8035). (See Chapter VIII, p. 119.) The common carrier by sea is subject to the same rules of extraordinary liability as the common carrier by land but this liability is controlled by the admiralty law of limited liability (Liabilities and Limitations, Chapter VIII, p. 112) and the provisions of the Harter Act. Like the land carrier, he may also enlarge or diminish his liability by special contract; such a contract must be clear and plain, based upon a meeting of minds, due consideration or mutuality, and conformity with law; it will not, however, protect against negligence on the part of the carrier. An example is found in the *Guildhall*, 58 Fed. 796, where a cargo was damaged in a collision occasioned by improper navigation. The owners of the ship based their defense on a provision in the bill of lading, which attempted to exempt from liability for "any neglect or defaults of the master, mariners, or others in the service of the owners, collision, perils of the seas," etc. It was held:

These stipulations are valid by the law of Rotterdam (the port of departure), and of England. But the obligation of the steamer, as a common carrier, was to deliver her cargo safely in this country, at the port of New York. As against the consignee and owner here, she can not commit torts on the high seas against his property with immunity, nor justify such torts, except by some valid contract, proved according to the law of the forum. By numerous decisions of the Supreme Court of the United States, stipulations like these, inserted by a common carrier in a bill of lading, are, first, void as against public policy; and secondly, they are not evidence of any contract to that effect on the part of the shipper and consignee; because unreasonable and not having the necessary element of voluntary assent.

See also *Compania de Navigacion La Flecha v. Brauer*, 168 U. S. 104:

Exceptions in a bill of lading or charter-party, inserted by the shipowner for his own benefit, are unquestionably to be construed most strongly against him.

In this case the cargo consisted of cattle, and the bill of lading contained this:

On deck at owner's risk; steamer not to be held accountable for accident to or mortality of the animals from whatever cause arising . . . It is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by . . . accidents of navigation, of whatever kind, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowner.

The vessel was improperly ballasted and rolled over on her beam ends. Some of the cattle were injured and in order to right the ship a number of them were thrown overboard, no discrimination being exercised between sound animals and those which had been injured. The court after laying down the general principles above quoted, further held:

The bill of lading itself shows that all the cattle to be carried under this contract were to be on deck. The words "on deck at owner's risk" cannot have been intended by the parties to cover risks from all causes whatsoever, including negligent or willful acts of the master and crew. To give so broad an interpretation to words of exception, inserted by the carrier and for his benefit, would be contrary to settled rules of construction, and would render nugatory many of the subsequent stipulations of the bill of lading.

The wrongful jettison of the sound cattle by the act of the carrier's servants cannot reasonably, or consistently with the line of English authorities already cited, or with our own decisions, be considered either as an "accident or mortality of the animals," or as a "loss or damage occasioned by causes beyond his control, by the perils of the sea, or other waters," or yet as a loss or damage "by collisions, stranding, or other accidents of navigation." There having been no collision, stranding, or other accident of navigation, there was nothing to which the only stipulation in the bill of lading against the consequence of negligence, default, or error in judgment of the master and crew could apply.

The bill of lading may be both a receipt and a contract and where the shipper accepts it at the time of delivering his goods, he is presumed to have agreed to its stipulations so far as they are reasonable and just. Such a contract merges all prior and contemporaneous negotiations and precludes parole evidence to vary its terms, but the subsequent delivery of a bill of lading will not necessarily affect a prior agreement, written or verbal, for the carriage; in other words, when a contract has been already made, the carrier cannot change it by a bill of lading without the shipper's consent.

If the holder of the bill of lading is also the charterer the

rights and obligations of the parties will ordinarily be governed by the charter party. Where the bill of lading incorporates the charter party by reference to it, of course the holder of the bill of lading is bound by the terms of the charter party. Where the charter party provides that bills of lading are to be made subject to the provisions of the charter, the rights of the holder of the bill of lading are subject to the charter party if he had knowledge or notice of it.

A suit in which a conflict arose between a bill of lading issued by a charterer and master, and a charter party of prior date, was the early case of *Gracie v. Palmer*, 8 Wheat. 605. The owners of the ship *America* chartered her at Philadelphia for a long voyage, the whole charter hire to be paid on the return of the ship to Philadelphia, but before the discharge of cargo. The owners appointed the master. In Calcutta, the charterer, who was on board, with the master's consent, got an advance of money from Palmer & Company, a Calcutta firm, and gave Palmer & Company a bill of lading which stipulated for the delivery of the cargo free of freight to Palmer & Company's agent in Philadelphia, who were to sell the goods and collect the amount of the advance out of the proceeds, unless the charterer's drafts for the amount of the advance, drawn in Palmer & Company's favor on a Philadelphia house, should be honored, in which event Palmer & Company's agents should deliver the goods to the charterer. The master signed the bill of lading given to Palmer & Company in Calcutta, which contained the clause, "Freight for the said goods having been settled here." The drawee refused to accept the charterer's drafts, and Palmer & Company's Philadelphia agent accordingly demanded the goods on the arrival of the ship. It was held, sustaining the contention of Daniel Webster, who represented the owners, that the shipowner had a lien on the cargo for the charter hire, the Court saying:

On what principles rests the general lien of goods for freight? The master is the agent of the shipowner, to receive and transport; the goods are improved in value, by the costs and cares of transportation. As the bailee of the shipper, the goods are in the custody and possession of the master and shipowner, and the law will not suffer that possession to be violated, until the laborer has received his hire. But this is literally the effect of that provision in the charter party which deprives the charterer of the right of landing the cargo until the stipulated hire be paid; or rather it would seem to go beyond

it, and impose a liability beyond what the common law exacts. It may, therefore, be fairly construed into a stipulation, that the charterer should, under no circumstances, dispense with the legal lien of the shipowner.

That the shipowner would not confide in the charter to land his goods without buying off his right to detain, is expressly proved by the contract. That contract was accessible to the foreign shipper, and ought to have been looked into to determine the extent of the power vested in the charterer . . . The charterer has contracted with the shipper to do an act, which he could not perform without violating his own contract to the shipowner, and must therefore be considered as having entered into a contract, subordinate in its nature to that previously existing between the owner and charterer.

On the other hand, it is held that the innocent *bona fide* endorsee of a bill of lading, which makes no reference to the charter party, and contains nothing to put him on notice or inquiry as to the existence of the charter party, is liable for freight only according to the terms of the bill of lading.

10. Statements in Bills of Lading.—The bill of lading commonly contains a statement of the number of packages or the weight of the goods or other representations with regard to the quantity shipped. There are several rules applicable to the effect of such statements. Where they appear in bills of lading covering shipments in interstate commerce or shipments from the United States to foreign ports, the effect of such statements is governed by the Federal Bill of Lading Act, approved August 29, 1916 (39 St. at L. 538). Under this act (§ 20) if the goods are laden by the *carrier* he is bound to count the packages, or ascertain the kind and quantity of bulk cargo. He is forbidden to insert in the bill of lading or in any other document relating to the ship any expression such as "shipper's weight, load and count," or any language indicating that the goods were loaded by the shipper and the description of them made by him. Where the goods are loaded by the *shipper* the act provides:

Section 21. That when package freight or bulk freight is loaded by a shipper and the goods are described in a bill of lading merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill of lading that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents of packages are unknown, or words of like purport are contained in the

bills of lading, such statements, if true, shall not make liable the carrier issuing the bill of lading, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may also by inserting in the bill of lading the words "Shipper's weight, load and count," or other words of like purport indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the non-receipt or by the misdescription of the goods described in the bill of lading: *Provided, however,* Where the shipper of bulk freight installs and maintains adequate facilities for weighing such freight, and the same are available to the carrier, then the carrier, upon written request of such shipper and when given a reasonable opportunity so to do, shall ascertain the kind and quantity of bulk freight within a reasonable time after such written request, and the carrier shall not in such cases insert in the bill of lading the words "Shipper's weight," or other words of like purport, and if so inserted contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein.

This act of Congress has no application to bills of lading for goods shipped from foreign ports and the rules governing representations in such bills of lading are different. Bills of lading for shipment from foreign ports when issued by the master do not bind the shipowner of the vessel for the number of packages or quantity of goods which the bill represents as having been shipped. This is the rule which prevailed as to all bills of lading prior to the passage of the act. It is based on the theory that the implied agency of the master for the shipowner does not extend to making misrepresentations in the bill of lading, so as to make it, as against the shipowner, a receipt for goods not received. It was intended to protect the shipowner against frauds committed conclusively between the master and shipper who have been known to enter into conspiracies whereby the master issued false bills of lading upon which the shipper subsequently raised money by assigning the bill.

There is another class of representations commonly found in the bill of lading relating to the condition of the goods, as that they are in "good condition" or "damaged condition." Where the goods are loaded by the shipper the effect of such statements is governed by § 21 of the Bill of Lading Act, above quoted, as to shipments in interstate commerce or from United States ports.

In other cases, e.g., where the carrier does the loading or where the act is not applicable, the rule is that representation made by the master in the bill of lading as to condition, bind the shipowner where the bill of lading has passed into the hands of a *bona fide* holder for value, the theory being that representations as to order and condition are within the scope of the master's authority.

11. Negotiability of Bills of Lading.—In mercantile law certain things have the quality of negotiability, that is, they are like money in that the title may pass from hand to hand by delivery without the necessity of inquiry into the antecedent ownership. Promissory notes, checks and drafts, payable to order or bearer, or so endorsed, are negotiable and the holder's title is not affected by any representations or transactions between the original parties or prior holders, without his knowledge. Many attempts have been made to give bills of lading the full quality of negotiability, but the courts have not favored the effort. Bills of lading are said to be quasi-negotiable. They may be transferred by endorsement and delivery and thereby pass the same title to the goods which they represent as if the goods themselves were handled. But prior to the passage of the Federal Bill of Lading Act, above mentioned, the transferee took only the title of his transferor, subject to all rights which may have been asserted against him. The bill of lading remained a mere substitute for the goods and the purchaser of a stolen bill, for example, acquired no more title than he would in the case of stolen goods. The latest legislation designed to confer upon bills of lading the quality of negotiable paper is that contained in § 22 of the Bill of Lading Act, which is as follows:

That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several States and with foreign nations, the carrier shall be liable to (a) the owner of goods covered by a straight bill subject to existing rights of stoppage in transition or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the nonreceipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of the issue.

This appears to protect a person to whom a bill of lading has been negotiated for value and who took it in good faith, relying

upon representations contained in it. A word of caution, however, is necessary. The provision is recent and has not been construed by the highest courts in a case involving a shipment by sea. The disposition of the courts has been to construe such legislation strictly. The act was intended to reverse the rule laid down in a line of decisions consistently adhered to by the Supreme Court down to the time of its passage. There can be no little doubt that any one seeking to maintain an action under § 22 of the act would have to bring himself strictly within the description of persons embraced in items (a) or (b) contained in the section.

12. Duration of Carrier's Liability.—The carrier's liability begins when he receives the goods for immediate transportation. He is not liable as a carrier if he receives the goods, but is ordered not to ship them pending further instructions from the consignor. In such case he remains a mere bailee, or perhaps a warehouseman, until the voyage actually begins. The carrier's liability ends when he gives notice of the arrival of the goods and has afforded the consignee a reasonable opportunity to remove them. He may go farther and stipulate in the bill of lading to terminate his responsibility as carrier immediately upon the putting of the goods ashore.

13. Exceptions in Bills of Lading.—In addition to perils of the sea, deviation and restraint of princes, which have already been mentioned, bills of lading frequently contain language designed to protect the carrier from liability for such things as damage due to breakage, leakage, heat, etc. Clauses of this kind will avail the carrier as a defense against suits for damages due to these causes provided the carrier is free from negligence. Inasmuch as these exceptions are in the nature of exemptions from a liability which is imposed by the policy of the law, the tendency of the courts is to interpret them with strictness against the carrier.

A provision in a bill of lading exempting the carrier from loss by theft will not relieve him from liability on account of a theft committed by a person in his employ, such as an officer of the vessel or a member of the crew.

14. Valuation.—There is some divergence in the decisions of the courts involving the valuation of the goods which is frequently stated in the bill of lading. If the language of the bill indicates that the amount stated is a limit or that the value is limited to the invoice price, the shipper may recover his actual loss up to but not exceeding that amount, subject to the invariable rule that a man

may not contract for relief from the consequences of his own negligence. The right of recovery on the valuation clause depends upon whether the owner of the goods has been subjected to loss. Thus if after the accident or injury the goods continue to be worth the amount of the valuation there is no loss and consequently there can be no recovery. The valuation clause cannot be used for the purpose of exempting the carrier from liability for all goods above a certain value. As is succinctly stated in the syllabus of *Calderon v. Atlas Steamship Co.*, 170 U. S. 272, 42 L. ed. 1033:

A stipulation in a bill of lading, that the carrier shall not be liable for goods of any description which are above the value of \$100 per package unless special agreement is made therefor, does not mean that the liability is limited to \$100 per package for such goods, but that the carrier shall not be liable for them to any amount, and is therefore void, under the Harter Act, as an attempt of the carrier to exonerate itself from all responsibility for such goods.

15. Notice of Claim.—It is very important for shippers to observe the provisions usually contained in bills of lading to the effect that the carrier will not be liable unless notice of loss be given within a certain limited time as such clauses are legal and enforceable, and if not complied with, the shipper will lose his right of action.

16. Nature and Effect of Charter Party.—This may be formal or informal, written or verbal, as the parties choose, but careful business men will prefer to have it executed with the same care and detail as is usually given to contracts of so important a nature. The operations under a charter always involve large responsibilities and liabilities upon some one, primarily upon the ship but ultimately upon the parties to the agreement. The adjustment of these by appropriate language necessitates a carefully drawn document and while many printed forms are in general use in various ports they should only be employed when both parties thoroughly understand the import of their provisions. The effect of the agreement may be to create a contract of carriage on the part of the owner or to completely divest him of any control over his ship. Where he merely rents or lets the carrying capacity, in whole or part, but retains possession, command and navigation through his own master and crew, he is the carrier and the charter is a contract of affreightment. Where he transfers the temporary ownership by relinquishing these things to the charterer, so that

the latter hires the officers and crew and operates the ship, he is not in the position of a carrier and is freed from obligations on her account, though the ship herself remains responsible.

Charters are of various kinds. A charter party which turns over the full control and operation of the ship to the charterer is called a demise of the ship. This may be for a fixed term, or for a particular voyage. In commercial practice, however, charters for a fixed term, that is to say time charters, seldom amount to a demise of the ship, but are usually mere contracts of affreightment. A charter party for a particular voyage is called a voyage charter. In usage such a charter may amount to a demise or may not, depending on whether or not the full control and operation of the ship is surrendered to the charterer. A charter which amounts to a demise is sometimes termed a bare boat charter. Under a charter which amounts to a demise, the owner will require payment of the charter money or freight in such installments as are agreed, the maintenance of his ship in good, seaworthy condition, protection against maritime liens and the prompt payment of all her expenses, and her return to him in like condition as when taken at the termination of the contract. The charterer will require undisturbed possession of the ship so long as he is not in default and agrees, that in event of default, the owner may cancel and resume possession. Provision should also be made for insurance and stipulated value in event of damage or total loss.

17. Subcharters.— In the absence of any prohibition in the original charter, a charterer may execute a subcharter or may assign the original charter.

18. Provisions in Charter Parties.— The legal construction of a charter party is governed by the rules of the law of contract. Material representations of fact contained in the instrument as inducements to the contract must be true or the contract will not be binding on the opposite party. Such representations are statements relating to the size, capacity, speed, condition and location of the ship.

(a) *Safe Port.*— Among other provisions of the contract, especially in time charters, is usually one to the effect that the vessel is to be employed only between safe ports. A safe port is one in which the physical conditions do not ordinarily expose a vessel to danger. Thus a port entirely exposed to the weather has been held unsafe, as have ports blocked by dangerous bars. A port in

which the vessel would be liable to forfeiture in time of war because of her nationality has been held unsafe.

(b) *Insurance*.— Where a time charter provides that the owner shall pay for the insurance the reference is to insurance for the benefit of the owner and not that of the charterer.

(c) *Redelivery*.— While a time charter is, as the name implies, a contract for the definite period of time expressed in the charter, it is obvious that the exigencies of navigation frequently render it impossible to redeliver the vessel on the precise date when the period expires. It is customary, therefore, to provide that the charter hire shall continue at the same rate until the time of redelivery unless the vessel be lost. It is the duty of the charterer to redeliver the vessel as nearly as possible to the expiration date of the charter, but if the vessel is delayed through no fault of his, he cannot be held in damages for breach of the charter, even though he may not be able to make redelivery for months beyond the expiration date. So long as the delay be practically unavoidable, he is liable merely for the stipulated charter hire until redelivery, and not in damages for breach of the charter (*Anderson v. Munson*, 104 Fed. 913).

The word "about" as a qualification of the charter period is sometimes inserted in time charters, as a further protection to the charterer, but it does not diminish his obligation to surrender the vessel as nearly as possible to the expiration date.

(d) *Cancellation and Withdrawal*.— Charters usually contain a clause which provides that, if the vessel fails to arrive at the loading port by a certain date, in condition to be laden—i.e., with cargo space available—the charterers may cancel the obligation. The clause does not entitle the vessel to loaf toward the loading port so as just to arrive by the cancellation date. If she does not proceed with reasonable promptness, the charterer will be entitled to damages, even though she arrive by the cancellation date.

Correlative to the charterer's right of cancellation, it is usual for charter parties to contain a provision to the effect that charter hire is to be paid in advance and that in default of such payment the owner shall be entitled to withdraw the vessel from the charterer.

(e) *The Breakdown Clause*.— Time charters frequently pro-

vide that in the event of loss of time arising from the breakdown of machinery, lack of men or supplies for more than twenty-four hours, the payment of charter hire shall be suspended for the period from which she is inoperative, but if the vessel is driven into port by circumstances of weather or accident to cargo, the loss of time due to these causes shall fall upon the charterer. Such provisions are enforceable according to their language and intent. If the breakdown endures beyond the period of twenty-four hours the charter hire ceases not only for the excess, but for the twenty-four hours also.

19. Lien for Freight and Charter Hire.— It is fundamental that the goods carried are liable for the carrying charges, but the questions arise: In whose favor does the liability exist, and during what period does it exist? The lien for freight exists in favor of the person with whom the shipper contracts to carry the goods. Where the shipowner is operating the vessel on his own account as a carrier, the lien for freight exists in his favor. Where the vessel is chartered the contract of carriage is between the shipper and the charterer, and the lien for freight exists in favor of the charterer. The owner of a chartered ship has no lien for freight (unless conferred by the cesser clause, mentioned below), but he may have a lien on the goods to the extent of the unpaid freight for the purpose of securing his charter hire. This lien does not exist in favor of an owner who has demised or let the ship to the charterer, unless there is an express stipulation to that effect.

The so-called "cesser clause" is to the effect that "owner to have lien on cargo for freight, dead-freight, and demurrage, charterer's liability to cease when cargo shipped." The purpose of this clause is to bring the charterer's liability to an end at the loading port. In return for his exemption from liability to suit at the port of destination, he turns over to the shipowner his lien on the cargo for freight, dead-freight and demurrage.

Possession of the goods is, generally speaking, essential to the ~~lien~~ for freight or charter hire. It does not attach until the goods have been delivered for transportation. If, by contract, expressed in the bill of lading or otherwise, the freight is not payable until after the goods have been delivered, there is no lien, and the same is true if the freight is payable at a time and place other than those specified for the delivery of cargo. Ordinarily

the lien is discharged when possession of the goods is parted with; or by express waiver; or by implied waiver, such as a direction to pay the freight to another person.

It is usual to insert in time charters a clause providing for a lien for charter hire. Such provisions are valid, but they are not effective against the cargo unless the terms of the charter have been brought home to the shipper by a reference to the charter in the bill of lading, which is commonly done. To incorporate the charter in the bill of lading the reference to the charter in the bill must be explicit.

20. Liability for Loss or Damage.—In the case of goods, there is a primary liability on the ship.

The liability of a vessel *in rem* for want of due diligence in the care and custody of the goods received on board for transportation is the same whether the owners of the ship remain in possession as carriers or whether the terms of the charter party are such as to constitute a demise of the vessel for the voyage, so as to render the charterers the owners *pro hac vice* and alone personally responsible for the transportation. *The T. A. Goddard*, 12 Fed. 174.

As between the shipowner and the charterer, this will be borne as the charter party provides. In the case of loss or damage to the ship, the contract again controls if its provisions are explicit. If not, the ordinary rules of bailment of personal property control. If the charter amounts to a demise of the ship, the charterer is liable, for he engages to return the ship without injury by reason of his own negligence; if not a demise, the shipowner bears the loss. For losses caused by perils of the seas or by ordinary wear and tear, without negligence on his part, the charterer is not liable in the absence of an express stipulation.

In the case of the *Barnstable*, 181 U. S. 464, the vessel was chartered, the charterer employing the officers and crew to navigate her, as well as providing the ship's stores, supplies and fuel, and undertaking to pay all pilotage, port charges and other expenses. The owner was to keep the vessel insured and in repair. She came into collision with the schooner *Fortuna*. The owners of the *Fortuna* libeled the *Barnstable* and the owners of the latter vessel called upon the charterers to defend the suit. It was conceded that the collision and the consequent damage were due to the negligent operation of the *Barnstable* by the officers and crew employed by the charterers to operate her. The court held that

the owners of the damaged schooner were entitled to look to the offending vessel for their damages. As between the owner and the charterer it was held that the charter amounted to a demise and the charterer was the temporary owner. He was therefore liable to the real owner, since he was bound to return the vessel. In the report of the argument of this case many authorities are cited showing the circumstances under which a charter party becomes a demise of the vessel.

In a contract of affreightment or charter not amounting to a demise — and this embraces time charters — the duty of navigation rests upon the shipowner. He is responsible for any damage due to negligence in navigation, even though the negligent individual had been employed by the charterer. In charters of this class the shipowner is also responsible for loading and discharging cargo. Stevedores are ordinarily regarded as being in the employ of the ship.

21. Demurrage and Laydays.— Time is usually of the essence of maritime and commercial transactions. Both parties must be punctual in the performance of their obligations. The shipowner must have the vessel at the appointed place and time for delivery to the charterer or to receive the cargo, as the agreement requires. The charterer must be on hand to receive her or to deliver the cargo for loading. The ship must pursue the voyage without deviation or delay. The consignee must be ready to receive his goods on their arrival. Failure to observe these requirements creates a liability for the damages ensuing or may dissolve the charter. If the contract is express in regard to these stipulations, no excuses will be useful unless they can be found in the agreement itself. It is usual to provide for these obligations under the name of demurrage. Of course, where the charter is for a definite period of time, they are unimportant, but otherwise, if it is for one or more voyages. The charterer has a number of days at his disposal for loading and discharging the cargo. These are termed laydays. If not specially provided, or fixed by the usage of the port or trade, a reasonable number will be implied. For the excess, the ship is entitled to demurrage to cover her loss of time and expenses, either at the rate named in the charter or of such amount as may be proved.

Until the laydays have expired there is no breach of the contract to load, but where the charterer refuses to accept the vessel

or provide a cargo, the owner need not keep her in readiness for delivery during all the laydays.

What constitutes readiness, or under what circumstances a ship is an "arrived ship," depends upon the terms of the bargain. Thus if the charterer requires her to reach her berth a notice given when she is in the stream will be insufficient. If she is to report for loading cargo she must have her loading apparatus ready and her cargo space available. The notice must actually reach the charterer unless he prevents it by absenting himself or his representative from the place where it is to be given. Notice should not be given on Sunday or a holiday, unless the charter expressly permits it.

In accordance with the general principle of the law of contract, laydays do not run if delay in loading or discharge is caused by the master or owner.

It is the duty of the charterer to have his cargo ready and he is liable for demurrage on account of the delay in furnishing cargo.

The charter party usually excepts Sundays and holidays from the laydays allowed for loading, but, after the expiration of the loading period (i.e., the laydays and the Sundays and holidays occurring among them), demurrage begins to be payable to the ship, and she is entitled to demurrage for Sundays and holidays as well as for secular days. This is because the work of loading in port does not usually proceed on Sunday, but a ship at sea continues on her voyage every day, so that every day's delay in departure causes an equal delay in arrival.

Charters often provide for "despatch money," which is a premium or allowance to the charterer for speed in loading. This is computed on each running day saved; that is, it is to be credited to the charterer for every day, including Sundays and holidays, occurring after the day on which the master is placed in a position to clear the vessel, up to and including the last layday, i. e., the end of the loading period. Despatch is not allowed unless bargained for in the charter.

22. Breach of Charter.— If the shipowner refuses to perform the charter, the charterer has a personal action for damages against him but no maritime lien against the ship. There is no such lien for breach of a purely executory contract, that is to say a contract no part of which has been performed. So, if the ship is ready but the charterer refuses to perform, the remedy is personal only

and not against the goods. Each must endeavor to mitigate his loss, the ship by seeking other employment, the charterer by looking for another ship. But after performance of the contract has once commenced, there are reciprocal liens on ship and cargo for its performance. The charterers have a lien on the vessel for all damages caused by a breach of the charter, the carrying out of which has been begun. For example, if the voyage is delayed after its commencement through the negligence of the owner, or if the master, while agent of the owner, violates the terms of the charter party, a lien arises in favor of the charterer.

In regard to the various obligations of the agreement, breaches by either party will either dissolve their relations or give rise to actions for damages. If nonperformance goes to the whole root and consideration of the contract, the other party may treat it as abrogated and be relieved from further obligation on his part in addition to his own claim for damages; if the nonperformance is not so vital, but may be amply compensated by damages, he will not be so relieved but must resort to his action.

The arbitration clause contained in a time charter is not enforceable in the United States.

23. Dissolution of Charter.—Like all other contracts, the charter party becomes dissolved by performance or by the acts of the parties amounting to a cancellation by agreement or waiver of performance. It may, however, be dissolved against the will of the parties and by causes extrinsic to them. Thus, although legal when made, if it becomes illegal before performance, it is as wholly void as if it were illegal at the outset. A state of war, for example, making all commercial intercourse with the enemy illegal, would annul all obligations under a prior charter for a voyage to an enemy port. So would legislation forbidding the importation of the cargo in question. A voyage charter may be dissolved by an accident to the vessel which prevents her making the voyage at the time contemplated. For example, in *Jackson v. Union Marine Insurance Co.*, L. R. 10. C. P. 125, the ship was to proceed with all possible despatch (dangers and accidents of navigation excepted) from Liverpool to Newport, and there to load and carry to San Francisco a cargo of iron rails. She left Liverpool January 2, and on the following day ran aground, sustaining considerable damage. It would necessarily have been many months before she could be got off and put in repair to enable her

to continue the voyage. The court held that in the commercial sense the voyage contemplated by the charter party had been brought to an end, and, under those circumstances, the contract was held to have determined. The voyage, if resumed, would have been a different voyage, "as different," in Baron Bramwell's words, "as though it had been described and intended to be a spring voyage, while the other, after the repair, would be an autumn voyage." The season within which the adventure was to be carried out was of importance to both parties, and it was thus easy to imply a condition that, if the voyage became impossible of completion within that season, the contract would be at an end. The exception as to dangers of the sea and accidents of navigation showed that the parties contemplated providing for some delay from these causes, but it was held that they were evidently not contemplating a delay so great that the spring voyage would become altogether impossible.

The particular adventure being a voyage to be carried out within reasonable limits of time furnished a definite standard by which it would be determined whether the delay which actually occurred was or was not within the exception clause. There was, therefore, no inconsistency between the implied condition and the express provisions of the contract.

Termination of a charter by frustration of adventure is not applicable to time charters. Thus the taking of the ship for the use of the government does not dissolve a time charter. This was held by the House of Lords, upon a very full consideration in the recent cause of *Tanplin Steamship Co. v. Anglo-Mexican Products Co., Ltd.*, 2 A. C. 397. There a vessel was chartered for five years for a fixed sum per month for the carriage of oil as the charterers or their agents should direct. The charter party contained an exception of arrests and restraint of princes, and the charterers had the liberty of subletting the steamer on admiralty or other service. After the outbreak of the war, when the charter party had nearly three years to run, the steamer was requisitioned for an indefinite period by the admiralty, which made extensive alterations and used her as a transport. The owners contended that the charter party had been determined by the requisition. The charterers, who were willing to continue to pay the charter hire (no doubt in order to entitle themselves as temporary owners to the compensation paid by the government) contended that the charter party had not been annulled and this

contention was sustained by the House, which held that the interruption was not of such a character that the court ought to imply a condition that the parties should be excused from further performance of the contract and that the requisition did not determine or even suspend the charter. Earl Loreburn said:

The violent interruption of a contract may always damage one or both the contracting parties. Any interruption does so. Loss may arise to some one whether it be decided that these people are or that they are not still bound by the charter party. But the test for answering the questions is not the loss that either may sustain. It is this: Ought we to imply a condition in the contract that an interruption such as this was to excuse the parties from further performance of it? I think not. I think they took their chances of lesser interruptions and the condition I should imply goes no further than that they should be excused if substantially the whole contract became impossible of performance or in other words impracticable by some cause for which neither was responsible. Accordingly I am of opinion that this charter party did not come to an end when the steamer was requisitioned and that the requisition did not suspend it or affect the rights of the owners or charterers under it and that the appeal fails.¹

Where the charter provides for the return of the vessel at the expiration of the term in as good condition as when taken, fair wear and tear from reasonable and proper use only excepted, and requires the hirer to make all repairs and assume liability for all loss and damage, an absolute obligation to return her is created and her total loss without any fault on his part will not exempt him from liability; he must return the ship or pay her value, and, if the charter party contains an agreement as to what that value is, that amount will be decreed by the court. In *Sun Printing & C. Association v. Moore*, 183 U. S. 642, the New York *Sun* newspaper chartered a yacht from Moore for newsgathering purposes in Cuban waters during the Spanish war. The charter party provided that the hirer was to keep "said yacht in repair and to pay all its running expenses and to surrender said yacht with its

¹ It may be inferred, however, that, if it had appeared that the requisition necessarily rendered the performance of the entire contract impossible, the charter would have been held to be dissolved. In this case, it was the owner, who saw a chance to make more money, who wanted the charter annulled; not the charterer whose adventure was being frustrated in a manner advantageous to him. It is a little difficult to suppose that the court would have required the charterers to go on paying charter hire, had they been unwilling to do so, for a vessel of which the government had deprived them of the use. Still, that conclusion is deducible from the language of the several lords who wrote opinions in the case.

gear, furniture and tackle at the expiration of this contract to the owner or his agent . . . in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted. It was further provided that "for the purpose of this charter the value of the yacht shall be considered and taken at the sum of \$75,000." The charter party was accompanied by a paper in the nature of a surety bond given by the *Sun* to secure the owner against any loss or damage to the vessel in an amount *not exceeding* \$75,000. The yacht was wrecked and totally lost. Moore sued for \$75,000 as representing the agreed value of the yacht. The *Sun* contended that the figure represented a penalty, enforceable only to the extent of actual damage. The court sustained a recovery of the full amount without deducting the charter hire. Justice White said:

It is elementary that, generally speaking, the hirer in a simple contract of bailment is not responsible for the failure to return the thing hired, when it has been lost or destroyed without his fault. Such is the universal principle. . . . But it is equally true that where by a contract of bailment the hirer has, either expressly or by fair implication, assumed the absolute obligation in return, even although the thing hired has been lost or destroyed without his fault, the contract embracing such liability is controlling and must be enforced according to its terms. . . .

As the stipulation for value referred to was binding upon the parties, the trial court rightly refused to consider evidence tending to show that the admitted value was excessive and the circuit court of appeals properly gave effect to the expressed intention of the parties.

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CHAPTER VIII

LIABILITIES AND LIMITATIONS

1. Liabilities of Ship.—As elsewhere observed, the ship resembles a person in maritime law and has a corresponding liability. In general, she is responsible for every benefit received and every wrong done as well as for every breach of governmental regulations. Particular instances may furnish exceptions to this general rule, but they will be only occasional exceptions. The ship should be considered as a juristic person and her liabilities like those of an ordinary corporation, quite apart from those of the natural persons in charge of her operations or interested in her ownership. The liability of a vessel arising out of contract is discussed elsewhere. The principle governing her liability for torts is laid down in the brig *Malek Adhel*, 2 How. (U. S.) 210:

The ship is also by the general maritime law held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a willful disregard of duty; as, for example, in case of collision and other wrongs done upon the high seas or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law, which looks to the instrument itself, used as the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party.

The liability ordinarily extends to the entire ship and all the appurtenances.¹ It may include the freight money and collision damage; it does not include the insurance; and it may be diminished by statutes like the Harter Act or by special agreements in the contract of carriage or similar stipulations.

2. Liabilities of Owner.—While it has been said that the liability of the ship and of the owner were convertible terms, the statement is hardly accurate in many cases. The owner may have so chartered the ship as to release him from personal responsibility;

¹ Liability does not extend to parts of a tow having no motive power of their own when attached to a tug whose faulty navigation caused a collision even though the damage resulted from the impact of the tow and the tug itself did not physically come into collision at all, and this is so notwithstanding the tug belongs to the same owner. *Liverpool &c. Navigation Co. v. Brooklyn Eastern Dist. Terminal*, U. S. Advance Sheets, 1919-20, 85, decided by the Supreme Court December 8, 1919.

he may be wrongfully deprived of her possession ; his liability may be limited by law or special agreement to her value. In other words, the ship is frequently liable and the owner is not ; and the owner can usually confine his liability to the value of the ship and otherwise go free from her obligations.

3. Liabilities of Charterer.—Where a vessel is so hired that the charterer has the exclusive possession, control and management, appointing the master and hiring the crew, there is said to be a demise of the ship and a temporary ownership in the charterer. He then becomes responsible for her obligations as if he were the real owner and has similar rights of limitation. The law provides that where a charterer mans, victuals and navigates the ship at his own expense, he shall be considered as owner within the provisions of the statutes limiting liability, and that the ship shall be liable, when so chartered, as if navigated by the owner (Rev. St. §4286).

4. Liabilities of Mortgagee.—These depend upon his possession of the ship. Where he takes possession and operates the ship for his own benefit, he assumes all the responsibilities of ownership but without the right to limit his liability to the value of his interest in the ship. Thus he may become personally liable for wages, supplies and repairs as well as for damages done by negligence. He may, by special arrangements, confine contract liabilities to the ship and, being lawfully in possession, he may create maritime liens upon her. A mortgagee out of possession is not considered as the owner even when he holds the record title under a bill of sale absolute on its face. He may still show that his title was by way of security only and so exempt himself from personal liability for repairs done or supplies furnished for the contracts or negligence of the mortgagor or other person having real ownership of the boat.

5. Liabilities of Underwriters.—The insurers are ordinarily strangers to the ship as far as concerns any authority to instruct the master or incur obligations on her account. Only in case of an abandonment of the vessel to them, when the loss is total or constructively total, and when they have accepted such an abandonment, does such authority arise. An abandonment when properly made, or accepted, vests the property in the underwriter and the master then becomes his agent. The underwriter is then the real owner and has all an owner's liabilities and limitations. There is, however, a very large intermediate class of disasters

where the underwriters decline an abandonment and yet take possession of the ship and cargo for the purpose of rescue and repair. Large expenses are thus created for which the damaged ship and cargo may be adequate security. The underwriters are personally liable, in the absence of special contract, for the contracts of their agents, although the nature of the business is such that it is often a practical difficulty to ascertain who were the insurers actually making the engagements and what was the real authority of those assuming to represent them. These questions are usually not raised during the exigencies of salvage operations but may become important when the work is unsuccessful and the expenses are unpaid.

6. *Theories of Limitation.*—The general maritime law has always been that an owner was not personally liable for the obligations of his ship as distinguished from his own agreements or delinquencies. It regards the ship as a distinct individuality similar to a corporation. The common law, on the contrary, considers the ship like any other kind of personal property and holds the owner correspondingly liable because his agents were in charge and he is liable for whatsoever they do within the scope of their agency. The maritime law retains an earlier notion of the common law, that it is against all reason to put blame or fault upon a man for the negligence of others and declines to hold him personally for what he cannot personally control. It also recognizes the fact that men of means will not invest in ships unless they can be protected against the unlimited liability of the common law. It holds that such a liability is inherently unjust when applied to the shipowner and it also accepts the situation in which the capitalist declines to invest in shipping unless that injustice is averted. Hence came the rule that the owner is not liable on account of the ship beyond the value of his interest therein and her freight pending and the corollary that he might absolve himself from all liability by abandoning the ship to her creditors. The theory is (at least as applied to torts) that:

If you surrender the offending vessel you are free, just as it was said by a judge in the time of Edward III, "If my dog kills your sheep and I freshly after the fact tender you the dog you are without recourse to me."²

² Justice Holmes in *Liverpool, etc., Navigation Co. v. Brooklyn Eastern Dist. Terminal* (*supra*).

This rule is in abrupt conflict with the theories of the common law and, while it has been expressed in statutory form in most maritime countries, the courts have been so far influenced by common law doctrines in its application that it does not prevail in its original integrity either in this country or in England. Congress has endeavored to restore it in the United States but the courts, so far, have declined to follow the plain language of the statute.

7. Contract Limitations.—To a considerable extent there may be an effective limitation of liability by special contract between the parties. The courts hold, generally, that limitations of liability in a contract must be reasonable if they are to be valid and they regard clauses which exempt the shipowner from liability for his own or his servants' negligence as unreasonable and also as contrary to public policy. At the same time, when the ship is not professing to be a common carrier and the contract is plain and on adequate compensation, such clauses may be, and are, enforced. Their efficiency will depend largely upon the contract itself and there is no hard and fast rule which prevents the private carrier from obtaining such limitations as he requires if the other party will agree thereto.

An illustration is found in the case of the *Royal Sceptre*, 187 Fed. 224, where the charter provided:

The ship is to be in no way liable for any consequences of . . . perils of the sea, . . . collisions, stranding, or other accidents or errors of navigation even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners.

Judge Hough said:

The quoted charter provision delimits the obligations of the ship, in so far as it goes, when reasonably interpreted. If therefore the proximate cause of this loss be a peril of the sea (or river), a stranding, an error of the pilot or negligence of the master, it may be assumed that libellant cannot recover; for, without any written limitation of liability, all that the bailor-libellant could require or expect from the bailee-claimant was the use of ordinary care and skill and that expectation has been (in part) bargained away for a consideration presumably expressed in the rate of charter hire.

8. The Federal Statutes.—The original law was enacted in 1851 (Rev. St. §§ 4284-4286; Comp. St. 1916, 8020-8027); that provided an absolute protection against loss by fire unless

caused by the design or neglect of the owner, and in case of practically all losses which might occur without the "privity or knowledge" of the owner, his liability was limited to the value of his interest in the ship and freight pending; provision was made for a general average of creditors and transfer to a trustee; in 1872 the Supreme Court promulgated rules of practice under which its benefits might be more efficiently applied by the admiralty courts. It was held that these statutes were enacted to restore the old doctrine of the maritime law, to encourage shipbuilding and the employment of ships in commerce, and for the public benefit. Hence they must be liberally construed in favor of shipowners. In a series of great decisions, commencing about 1870, the Supreme Court held the law constitutional; that foreign shipowners were entitled to its benefits; that the valuation of the owner's interest might be made as of the termination of the voyage or immediately after the disaster so that if the loss is total the liability is practically nil; that insurance was no part of the owner's interest in the ship or freight and need not be surrendered; and that the protection of the act extended to underwriters to whom the ship had been abandoned.

The original law had been passed with much difficulty and its language, as the result of compromise and concession, was subjected to much criticism as uncertain and ambiguous. The shipping interests of the country continued to decline and among the reasons assigned were the responsibility and liabilities left open or undefined by the law. About 1880, in connection with a vigorous attempt to revive the merchant marine, the entire subject received full consideration by Congress. The Act of June 26, 1884, was subsequently passed, and, expressly repealing all laws in conflict therewith, declared in a few words that "the individual liability of a shipowner shall be limited to the proportion of any and all debts and liabilities that his individual share of the vessel bears to the whole, and the aggregate liabilities of all the owners of a vessel on account of the same shall not extend the value of such vessel and freight pending." An amendment seeking to insert the condition that such debts must have been incurred without the owner's privity or knowledge was deliberately rejected. The courts, however, have declined to enforce the law according to its terms and held that Congress really intended to insert the condition as to privity or knowledge in spite of the

omission of the words and the rejection of the amendment which sought to insert them. The result is that the owner is still liable without limit for all obligations which arise out of matters of contract, according to the rules of the common law and in many instances of negligence on the part of his employees the same result seems to follow. His liability can not be limited where "privity or knowledge" is imputable to him and no accurate definition of these terms is yet available.

Under the present law, the voyage is the unit in respect to which limitation may be granted. Probably the shipowner may claim the benefit of the law at any time before he pays a final judgment in favor of the damage creditors, but he must account for the value of the ship as it was at the termination of the voyage on which the liability was created. The courts will not permit him to continuously operate the ship at the expense of her creditors and then finally abandon her to them loaded with the liens of many voyages. The rule is only a practical one and in special cases may work injustice to shipowners, as where ships make a continuous number of short trips between contiguous points. Part-owners are only liable according to the proportion of their shares, and the personal fault or privity of one does not necessarily implicate the others. It is not necessary that they should join in the same proceeding. The exemption is several and may be claimed by each without reference to the others.

9. "**Privity or Knowledge.**"—Limitation of liability can not be had against any loss or obligation unless incurred without the privity or knowledge of the shipowner. These words, by judicial construction, still remain as a condition or qualification of the law and it is unfortunate that no plain definition of their meaning has been yet supplied. The words have been discussed in many cases and there are many decisions in particular instances granting or denying the benefit of the law, but the expression is still undefined and perhaps is incapable of accurate legal definition. Some judges have held that "privity or knowledge" means the shipowner's own willful or negligent acts as distinguished from those of his agents or employees. This gives the broad and liberal construction of the law which the Supreme Court directed in its earlier decisions on the subject. On the other hand, judges of equal learning have been inclined to treat the matter by the standards of the common law and held that the acts or faults of

agents or servants are those of the principal and that he must be as personally liable as if he had done them himself. These would limit the protection of the law to the acts of the master of the ship when beyond control of the owner and give it a close construction against the shipowner. This has been the tendency of the later decisions of the Courts of Appeals and the Supreme Court has so far acquiesced in them. There has also been a development of a doctrine to the effect that there can be no limitation against the enforcement of the shipowner's personal contracts, and engagements made by various employees and managing owners have been held to be within this class. This rule depends on the theory of privity or knowledge, as, of course, there can be no such thing as a contract relation without privity or knowledge of its subject-matter. Thus in the recent case of *Luckenbach v. McCahan Sugar Ref. Co.*, 248 U. S. 139, decided December 9, 1918:

But the liability of the owners sought to be enforced here is one resting upon their personal contract; and to such liabilities the limitation acts do not apply.

Similarly in another recent case, *Pendleton v. Benner Line*, 246 U. S. 353:

The contract was between human beings, and the petitioner, by his own act, knowingly made himself a party to an express undertaking for the seaworthiness of the ship. That the statute does not limit liability for the personal acts of the owners, done with knowledge, is established by *Richardson v. Harmon*, 222 U. S. 96. It was said in that case, p. 106, that § 18 leaves the owner "liable for his own fault, neglect, and contracts."

It is said that the owners did their best to make the vessel seaworthy, and that if it was not so the failure was wholly without the privity or knowledge of the petitioner. But that is not the material question in the case of a warranty. Unless the petitioner can be discharged from his contract altogether he must answer for the breach, whether he was to blame for it or not.

In the case of corporate shipowners it is said that the privity or knowledge must be that of the managing officers, but there is no definition of who the managing officers are and the term is not capable of accurate definition. The law of limitation of liability of shipowners in the United States is not now plain or simple nor is it in harmony with the general maritime law or

that of other commercial countries. Where the owner can prove that the loss occurred without his privity or knowledge he will obtain protection, but just what facts or ignorance of facts he must prove to reach this result can not be stated at the present time.

10. **Harter Act.**—This law was enacted by Congress in 1893, and corresponds to a similar English statute of about the same date. It may be found in 7 Comp. St., 1916, §§ 8029-8035. The text of the act follows:

Chapter 105. An act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that it shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words and clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligation of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants, to carefully handle and stow her cargo and to care for and properly deliver the same, shall in any wise be lessened, weakened or avoided.

Sec. 3. That if the owner of a vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owners or managers, agents or charterers, shall become or be held responsible for damages or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality or vice of the thing carried, or from the insufficiency of package, or

seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

Sec. 4. That it shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports, to issue to shippers of any lawful merchandise a bill of lading or shipping document, stating, among other things, the marks necessary for identification, number of packages or quantity, stating whether it be carrier's or shipper's weight, an apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be *prima facie* evidence of the receipt of the merchandise therein described.

Sec. 5. That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs of such violation shall be a lien upon the vessel whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor, in any district court of the United States within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the government of the United States.

Sec. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statutes defining the liability of vessels, their owners or representatives.

Sec. 7. Sections one and four of this act shall not apply to the transportation of live animals.

Sec. 8. This act shall take effect from and after the first day of July, eighteen hundred and ninety-three. Approved February 13, 1893.

The general purpose of the act is understood to have been to regulate the relations between ship and cargo, so as to provide a limitation of liability, beyond that granted by the earlier statutes as to damages in general, by providing that if the owner exercised due diligence to make his ship seaworthy neither he nor his vessel should be liable for losses resulting from fault or error in the navigation or management of the vessel. The courts, however, have construed the statute closely against the shipowner and it is doubtful whether it has not rather increased his original liabilities instead of limiting them. He is still held to his warranty of absolute

seaworthiness at the beginning of the voyage; stipulations in the bill of lading are prohibited which tend to relieve him from liability for loss arising from negligence, fault or failure in proper loading, stowage, care or proper delivery and he is forbidden to insert any clauses lessening his common-law obligations as a carrier.

In the *Carib Prince*, 170 U. S. 655, the damage to cargo was caused by latent defects in a rivet, from which the head had come off, leaving a hole through which water entered and injured libellant's merchandise. The defect was due to too much hammering during the construction of the hull, causing the rivet to become brittle and weak. By reason of this defect the vessel was unseaworthy at the time the bill of lading was issued, although the owner did not know it. The bill of lading exempted the owner of the vessel from liability on account of "latent defects in the hull." The court held that the bill of lading was intended to confer exemption only to latent defects arising subsequent to sailing and consequently that there was no contractual limitation of liability, and with reference to the exemption from liability claimed under the Harter Act, said:

Because the owner may, when he has used due diligence to furnish a seaworthy ship, contract against the obligation of seaworthiness, it does not at all follow that when he has made no contract to so exempt himself he nevertheless is relieved from furnishing a seaworthy ship, and is subjected only to the duty of using due diligence. To make it unlawful to insert in a contract a provision exempting from seaworthiness where due diligence has not been used, cannot by any sound rule of construction be treated as implying that where due diligence has been used, and there is no contract exempting the owner, his obligation to furnish a seaworthy vessel has ceased to exist. The fallacy of the construction relied upon consists in assuming that because the statute has forbidden the shipowner from contracting against the duty to furnish a seaworthy ship unless he has been diligent, that thereby the statute has declared that without contract no obligation to furnish seaworthy ship obtains in the event due diligence has been used.

The exemption of the owners or charterers from loss resulting from "faults or errors in navigation or in the management of the vessel," and for certain other designated causes, in no way implies that because the owner is thus exempted when he has been duly diligent that thereby the law has also relieved him from the duty of furnishing a seaworthy vessel. The immunity from risks of a de-

scribed character, where due diligence has been used, cannot be so extended as to cause the statute to say that the owner when he has been duly diligent is not only exempted in accordance with the tenor of the statute from the limited and designated risks which are named therein, but is also relieved as respects every claim of every other description from the duty of furnishing a seaworthy ship.

In the *Wildcroft*, 201 U. S. 378, a cargo of sugar was injured by an opening of a valve in the ship's side in such a manner that water got into the cargo. The vessel was in all respects seaworthy at the beginning of the voyage, and the court held that having discharged the duty of providing a seaworthy ship the vessel was relieved from liability arising out of an unseaworthy condition, which devolved after the beginning of the voyage and without the fault of the owners. It was emphasized, however, following the case of the *Southwark*, 191 U. S. 1, that the burden is upon the owner of a vessel

to show by reasonable and proper tests that the vessel was seaworthy and in a fit condition to receive and transport the cargo undertaken to be carried and that if, by failure to adopt such tests and furnish the required proofs, the question of the ship's seaworthiness was left in doubt, that doubt must be resolved in favor of the shipper, because the vessel owner had not sustained the burden cast upon him by the law to establish that he had used due diligence to furnish a seaworthy vessel.

As it emerges from the interpretation of the courts, the effect of the Harter Act seems to amount to this:

The act says to the shipowner:

1. You may make a valid bargain by which you will be exempted from liability, if you use due diligence to make the ship seaworthy at the beginning of the voyage, and some defect develops which eluded your diligence. Unless you make such a bargain, your obligation to provide a ship which is seaworthy at the commencement of the voyage is absolute, and, in no event, can you bargain to relieve yourself from using due diligence.

2. You cannot bargain away your duty and obligation to use due diligence to see that your vessel is maintained in seaworthy condition during the voyage, but you may, if you like, bargain that if you use due diligence and your ship nevertheless become unseaworthy, you shall be relieved from responsibility for damage to cargo on that account.

3. If you use due diligence to employ a competent master and

crew and their skill in navigation fails or the ship encounters perils of the sea and accident happens to the cargo you are not responsible for the damage. Your exemption from responsibility in this case is given by the statute and you do not need to bargain for it.

4. Your exemption from liability does not extend to damage due to improper loading and stowage.

11. **Insurance.**—Where the shipowner is entitled to the benefits of the Limited Liability Law, his liability is terminated by a surrender or abandonment of the ship and her pending freight. He may retain the insurance and her creditors can not claim it. He is not obliged to account for the insurance money which he may have collected for the loss or damage to his vessel. In this respect the law of the United States is more liberal to the shipowner than that of many other countries. The question was decided in the cases of the *City of Norwich*, 118 U. S. 468, and the *Scotland*, in the same volume at page 507. The latter will illustrate the rule; the *Scotland* and the *Dyer* were in collision and both sunk; the lower court held the *Scotland* at fault and awarded the owners of the *Dyer* upwards of \$250,000, as damages. The value of the *Scotland* before the collision was about \$500,000, and her owners had collected insurance on her to the amount of \$299,867.42. The value of her wreckage was \$4,927.85. The Supreme Court held that her owners' liability was limited to this last amount and that the owners of the *Dyer* could not claim any part of the insurance.

12. **Single Ship Companies.**—This is a form of organization which has the advantages of the general law of corporations in limiting the liability of shareholders to the amount of their stock. If such a corporation has all its capital invested in a single ship, its liability is, of course, limited to the amount of the investment and if the shares have been paid in full there can be no further calls upon the shareholders. When the ship is lost, all liabilities are lost with her except such as the shareholders may have personally guaranteed or assumed. The corporation which owns several ships will obviously not have the same degree of limitation. Hence the popularity among investors, particularly in England, of the single ship company. As far as the corporate affairs are concerned the laws of the State in which it is incorporated must be observed. In the maritime law, its status is that of an indi-

vidual shipowner. The privity or knowledge of its managing officers may preclude it from the protection of the admiralty law of limited liability; if so, it cannot retain the insurance or any other part of its capital against its creditors, but, when the capital is lost or exhausted, the stockholders who have paid in full for their shares will have no further responsibility.

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CHAPTER IX

MARITIME LIENS

1. **How Created.**— In general and within the limits hereinafter mentioned, every service rendered to a ship and every injury done by a ship, creates a maritime lien upon her for the benefit of the individual who did the work or suffered the wrong.

Those who furnish supplies or fuel or provisions, or make repairs, or render services, as well as the members of the crew and officers (except the master) acquire such liens for the collection of the amounts due them. A like right or privilege accrues for the damage done through negligence on the part of the ship resulting in damage to persons or property, as by collision or injury to cargo. So these liens are divided into two classes, those *ex contractu* (arising out of agreements, express or implied) and those *ex delicto* (arising out of wrongs or torts).

The authority of the master to obligate the ship so that a lien arises has been discussed under the title "Master."

The managing owner, ship's husband, master or any person to whom the management of the vessel at port of supply is entrusted may by ordering supplies, repairs, render the vessel liable to a maritime lien. If the master be drunk or disabled and another person is discharging his duties and is in effect for the time being master of the ship, such person may create a valid lien. Thus it has been held that the vessel is bound for supplies ordered by the mate acting during the illness of the master. The vessel is also bound for supplies furnished on the order of any member of the ship's company and with the master's knowledge and acquiescence. It is customary in the administration of a large modern ship for the head of each department, e. g., the steward, chief engineer, to order supplies and for these the vessel is responsible, but only on the theory that the purchases are made with the master's authority, and if the person contracting the obligation has acted in excess of the powers delegated to him by the master, the ship will not be bound. It is incumbent on the person furnishing goods to a vessel to inquire into the au-

thority of the individual ordering the same. Moreover, if the goods ordered are greatly in excess of the vessel's needs, it is incumbent upon the supplier to know that fact and if the goods ordered, even by the master personally, are greatly in excess of the vessel's needs the ship will not be bound.

A maritime lien attaches to the offending ship only, and not to her cargo (except for unpaid freight) and this is true even though the cargo belonged to the owner of the offending ship. As was said by Mr. Justice Brown in the case of the *Bristol*, 29 Fed. 867:

The cargo, except for the collection of the freight due, cannot be held for the faults of the ship. There being no lien beyond freight due, no proceeding *in rem* lies against the cargo for damages by collision, if the freight be paid, whether the cargo belongs to the owner of the offending vessel or not; and, if arrested, the cargo must be released upon the payment of the freight due.

A maritime lien, being essentially a remedy against the vessel, may attach even in a case in which the owners are not personally responsible; as for instance, where a state pilot, in charge of a ship under a state statute which renders his employment compulsory, negligently brought the ship into collision, she was subjected to a lien for the damage done, although the pilot was in no sense the agent of the owners, and no personal liability rested upon them. *The China*, 7 Wall. 53.

The lien attaches only by virtue of contracts or torts which are wholly maritime in their nature. It is frequently difficult to determine the nature of a contract or tort. Thus persons digging ice and snow from around a vessel on a beach, and about to be launched did not acquire a maritime lien because the service was performed on shore. Whereas persons who floated a vessel which had been carried far ashore were held to have performed a maritime service and to be entitled to a lien. In a case in which a vessel communicated fire to a wharf to which she was made fast, it was held that the tort was not maritime, whereas, had she been in the stream and had communicated fire to another vessel in the stream, the tort would have been maritime and would have given rise to a maritime lien (*Hough v. Trans. Co.*, 3 Wall. 20). Conversely a tort having its inception on land and completed on shipboard will give rise to a lien. As for example where a man working on board ship was injured by a piece of lumber thrown through a chute by a man working on a wharf. (*Herman v. Mill Co.*, 69 Fed. 646).

A lien arises in favor of the owners or temporary owners of a vessel upon cargo actually on board for unpaid freight and for demurrage. This is the only case in which possession of the security is essential to the existence of a maritime lien. If the cargo is removed from the ship the maritime lien is lost. In this class of cases suit to enforce the lien should be instituted before the cargo is discharged.

2. Essential Value.—The essential value of these liens lies in the right they give to have the ship arrested and sold by a court of admiralty for their satisfaction, and in the speed and security with which the remedy can be applied. The vessel is arrested immediately upon the filing of the libel, before the liability is proven or the case tried, and may not leave port without giving bond to secure the claim (see Chapter XVII, Admiralty Remedies).

3. Independent of Notice or Possession.—They do not depend upon notice or recording or possession and do not in any way resemble a mortgage. They are, in fact, an actual property in the ship, created as soon as the service is rendered or the wrong suffered (Yankee Blade, 19 How. 82).

4. Secret.—As these liens do not depend upon notice or record, they are essentially secret in their nature and even purchase of the ship, in good faith and for value, will not be protected against them (The Marjorie, 151 Fed. 183).

5. Diligence Required.—On the other hand the law requires the lienor to be diligent in enforcing his lien so that third parties may not be unduly prejudiced thereby. If he is not diligent, the court will hold him guilty of laches and the lien may become stale as against all parties other than the owner.

6. Rules of Diligence.—There are no hard and fast rules defining diligence or the limit after which a lien becomes stale. Under the general maritime law, the voyage was the test; liens which accrued on one voyage were required to be enforced before another voyage was made or they became stale as to those of the latter. In deep-sea navigation, where the voyages are prolonged, this rule still obtains. On the Great Lakes, where the trips or voyages are comparatively short, and navigation is closed by the winters, the season of navigation is the rule. Liens not enforced during the season or the following winter will be postponed to those of the later season. In New York harbor, the local conditions have resulted in a forty-day rule; in Virginia, under some-

what different conditions, a one-year rule has appeared. The safe method is to be prompt and diligent in collecting liens against a ship; delay is always dangerous and there may be no other financial responsibility. This course is also for the best interests of the shipowner; interest and costs accumulate rapidly where the liens are enforced by the courts.

In the case of the *Marjorie*, 151 Fed. 183, above cited, a private yacht was libeled in Baltimore on account of coal furnished her in Norfolk nearly a year previously. She spent that time voyaging up and down the coast, putting in at various ports and when libeled had been laid up for the winter. She had not been in Norfolk subsequent to the occasion on which the coal was furnished. About six months after the coal was furnished she was sold to a new owner, who, finding no lien on record against her, paid the full purchase price. The Court held:

As commercial enterprise would be vexatiously incommoded and the free circulation and disposal of vessels prevented if such liens, which are not required by law to be made manifest by public registration, were allowed to lie dormant for an indefinite period, the courts have uniformly held, where the rights of *bona fide* purchasers will be injuriously affected if it is allowed to prevail, that the lien is lost if there has been long delay, and there has been reasonable opportunity to enforce it. The diligence required is usually measured by the opportunity of enforcement. In nearly all of the cases where the courts have held the lien to be lost and where there has been change of possession, there has been unreasonable delay on the part of the creditor in availing himself of the opportunities of enforcing his lien.

In the case under consideration the libel was filed within less than a year. The yacht had been sailing from port to port, and never came within the jurisdiction of the port where the supplies were furnished. The claim was a small one and hardly justified the employment of a detective to follow her wanderings. The lien was asserted as soon as the yacht was found. . . . The law is well settled that liens of this nature must be sustained if there has been reasonable diligence in asserting them. A long line of decisions shows that a delay of a year in circumstances such as are disclosed by the testimony is not unreasonable, and to lay down any other rule would tend to unsettle the law and to disturb the credit which in the interest of commerce must be extended to ships for supplies when away from their home ports to enable them to continue their voyages, a credit only given upon the faith that they have a lien upon the ship.

7. Recording Liens on "Preferred Mortgage" Vessels.—
The Merchant Marine Act of 1920 (Sec. 30, Subsection G. See

Appendix), provides that any one claiming a lien on an American ship which is subject to a "preferred mortgage" as defined in that Act (see Chapter X, *infra*) may record a notice of his lien with the Collector of Customs at the port of documentation, and upon the discharge of the indebtedness, shall file a certificate to that effect. A lienor who has recorded his lien is entitled to notice of any proceeding for the foreclosure of a preferred mortgage. This provision is intended to enable the lienor to come in and protect his interest.

8. Limited to Movable Things.— These liens arise only upon movable things engaged in commerce and navigation. They cannot exist in anything which is fixed and immovable and not the subject of maritime commerce or navigation. Thus they will subsist in vessels, rafts and cargoes but not upon a bridge or a ship totally out of commission (Rock Island Bridge, 6 Wall. 213; Pulaski, 33 Fed. 383). The lien has been sustained against a dredge. (Atlantic, 53 Fed. 607).

9. Priorities.— Important priorities exist among maritime liens and these are adjusted when the ship is sold in admiralty to satisfy her debts. The purchaser at an admiralty sale, as elsewhere stated, takes the ship free of all existing liens; the proceeds of the sale are distributed among the lienors according to their priorities, after deducting costs and expenses.

Liens for torts take precedence over all prior liens, and the later lien for tort will be preferred to an earlier if there has been an absence of diligence in enforcing it. The John G. Stevens, 170 U. S. 113, is the leading case on the priority of liens against the offending vessel for torts committed by her. Mr. Justice Gray held:

But the question we have to deal with is whether the lien for damages by the collision is to be preferred to the lien for supplies furnished before the collision.

The collision, as soon as it takes place, creates, as security for the damages, a maritime lien or privilege, *jus in re*, a proprietary interest in the offending ship, and which, when enforced by admiralty process *in rem*, relates back to the time of the collision. The offending ship is considered as herself the wrongdoer, and is herself bound to make compensation for the wrong done. The owner of the injured vessel is entitled to proceed *in rem* against the offender, without regard to the question who may be her owners, or to the division, the nature, or the extent of their interests in her. With the relations of the

owners of those interests, as among themselves, the owner of the injured vessel has no concern. All the interests existing at the time of the collision in the offending vessel, whether by way of part ownership, of mortgage, of bottomry bond, or of other maritime liens for repairs or supplies, arising out of contract with the owners or agents of the vessel, are parts of the vessel herself, and as such are bound by and responsible for her wrongful acts. Any one who had furnished necessary supplies to the vessel before the collision, and had thereby acquired, under our law, a maritime lien or privilege in the vessel herself, was, as was said in *The Bold Buccleugh* [7 Moore P. C. 267] before cited, of the holder of an earlier bottomry bond, under the law of England, "so to speak, a part owner in interest at the date of the collision and the ship in which he and others were interested was liable to its value at that date for the injury done without reference to his claim [7 Moore P. C. 285]."

Liens arising out of matters of contract will be paid in substantially the following order:—

Salvage.

Sailors' wages and wages of a stevedore when employed by master or owner.

"Preferred mortgages" (see below).

Pilotage and Towage.

Supplies and Repairs.

Advances of Money.

Insurance premiums (where a lien).

Mortgages not preferred.

It may be regarded as the grand rule of priority among maritime liens, that they are to be paid in the *inverse order of the dates* at which they accrued. Liens arising on a later voyage have priority over liens of an earlier voyage, and the later in point of time which have been for the preservation or improvement of the vessel, are to be paid in the inverse order of the dates at which they accrued, the later debt being paid in full before anything is allowed to the lien of an inferior grade. The reason for this is because the loan, or service, or whatever created the later lien has tended to preserve or improve the first lien-holder in security for his lien. He is to be preferred who contributed most immediately to the preservation of the thing.

An important qualification of the rule heretofore governing the priority of maritime liens on American vessels, is made by the Ship Mortgage Act of 1920 (Merchant Marine Act, see Appendix). By this act certain mortgages which conform to its

provisions are called "preferred mortgages" and are made maritime liens enforceable in admiralty. In the order of priority, a preferred mortgage lien comes next after liens arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew, for general average and for salvage. Liens for repairs, pilotage, towage, freight and charter hire come in subsequent to "preferred mortgages."

The subjects of liens for salvage, wages, pilotage and towage, advances, mortgages, freight and charter hire are discussed under the appropriate titles in this book.

10. Lien for Repairs and Supplies.— By act of Congress approved June 23, 1910, provisions were made which substantially changed the law as it existed theretofore. This act was repealed and reenacted with amendments by the Merchant Marine Act of 1920 (see Appendix). The latter act (Sec. 30), representing the present state of the law, provides:

Subsection P. Any person furnishing repairs, supplies, towage, use of drydock or marine railway, or other necessities, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit *in rem*, and it shall not be necessary to allege or prove that credit was given to the vessel.

Subsection Q. The following persons shall be presumed to have authority from the owner to procure repairs, supplies, towage, use of drydock or marine railway, and other necessities for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

A person furnishing supplies or repairs to a vessel in the absence of her owners or temporary owners, and elsewhere than in her home port, and upon the order of the master, should inquire into the necessity for the supplies or repairs. If, upon reasonable inquiry, he finds that they are necessary, he may safely furnish them, relying on the credit of the vessel and upon his right to a maritime lien upon her. If reasonable inquiry fails to show any necessity, the supplier or repairer will not be entitled to a lien, even though the master gave the order.

In the case of the *Valencia*, 165 U. S. 264, the home port of the ship was Wilmington, North Carolina. She was plying between

New York and Maine. Coal was ordered for her in New York, not by the master, but by a steamship company doing business in New York whose relations to the vessel were not inquired into by the suppliers of the coal. If they had inquired, they would readily have learned that the steamship company was a charterer of the vessel and was bound by the charter party to "provide and pay for all coals." The coal was not paid for and the suppliers libeled the ship. In directing the libel to be dismissed the Supreme Court said:

Although the libellants were not aware of the existence of the charter party under which the *Valencia* was employed, it must be assumed upon the facts certified that by reasonable diligence they could have ascertained that the New York Steamship Company did not own the vessel, but used it under a charter party providing that the charterer should pay for all needed coal. The libellants knew that the steamship company had an office in the city of New York. They did business with them at that office, and could easily have ascertained the ownership of the vessel and the relation of the steamship company to the owners. They were put upon inquiry, but they chose to shut their eyes and make no inquiry touching these matters or in reference to the solvency or credit of that company. It is true that libellants delivered the coal in the belief that the vessel, whether a foreign or a domestic one, or by whomsoever owned, would be responsible for the value of such coal. But such a belief is not sufficient in itself to give a maritime lien. If that belief was founded upon the supposition that the steamship company owned the vessel, no lien would exist, because in the absence of an agreement, express or implied, for a lien, a contract for supplies made directly with the owner in person is to be taken as made "on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived." The *St. Jago de Cuba*, 9 Wheat. 409. And if the belief that the vessel would be responsible for the supplies was founded on the supposition that it was run under a charter party, then the libellants are to be taken as having furnished the coal at the request of the owner *pro hac vice*, without any express agreement for a lien, and in the absence of any circumstances justifying the inference that the supplies were furnished with an understanding that the vessel itself would be responsible for the debt incurred. In the present case, we are informed by the record that there was no express agreement for a lien, and that nothing occurred to warrant the inference that either the master or the charterer agreed to pledge the credit of the vessel for the coal.

We mean only to decide, at this time, that one furnishing supplies or making repairs on the order simply of a person or corporation acquiring the control and possession of a vessel under such a charter

party cannot acquire a maritime lien if the circumstances attending the transaction put him on inquiry as to the existence and terms of such charter party, but he failed to make inquiry, and chose to act on a mere belief that the vessel would be liable for his claim.

The law is even more succinctly stated in the case of the *Kate*, 164 U. S. 458, as follows:

The principle would seem to be firmly established that when it is sought to create a lien upon a vessel for supplies furnished upon the order of the master, the libel will be dismissed if it satisfactorily appears that the libellant knew, or ought reasonably to be charged with knowledge, that there was no necessity for obtaining the supplies, or, if they were ordered on the credit of the vessel, that the master had, at the time, in his hands, funds, which his duty required that he should apply in the purchase of needed supplies. Courts of admiralty will not recognize and enforce a lien upon a vessel when the transaction upon which the claims rests originated in the fraud of the master upon the owner, or in some breach of the master's duty to the owner, of which the libellant had knowledge, or in respect of which he closed his eyes, without inquiry as to the facts.

If no lien exists under the maritime law when supplies are furnished to a vessel upon the order of the master, under circumstances charging the party furnishing them with knowledge that the master cannot rightfully as against the owner, pledge the credit of the vessel for such supplies, much less one is recognized under that law where the supplies are furnished, not upon the order of the master, but upon that of the charterer who did not represent the owner in the business of the vessel, but who, as the claimant knew, or by reasonable diligence could have ascertained, had agreed himself to provide and pay for such supplies, and could not, therefore, rightfully pledge the credit of the vessel for them.

Where a charterer becomes the owner *pro hac vice*, as usually occurs in the case of a "bare-boat" charter, necessary supplies ordered by the master will entitle the supplier to a maritime lien under the statute, unless the charter party contains stipulations that were known to the supplier or which he could have readily ascertained, excluding such liens. Thus in the latest decision of the Supreme Court in which the act of June 23, 1910, was construed (*South Coast S. S. Co. v. Rudnbach*, decided March 1, 1920) a bare vessel was chartered to one Levick, the contract stipulating that Levick was to pay all charges and save the owners harmless from all liens. There was also a provision that the owner might retake the vessel in case Levick failed to discharge any liens within thirty days, and a provision for the surrender of the vessel free of

all liens, if Levick failed to make certain payments. The master of the ship had been appointed by the owner, but was under Levick's orders. When the supplies were ordered representatives of the owners warned the supplier that the steamer was under charter and that he must not furnish supplies on the credit of the vessel. He disregarded the warning and furnished the supplies and libeled the vessel for his lien. The Court upheld his right to the lien, holding that the warning of the owner was ineffectual because the charterer had become the owner *pro hac vice*, the master being his agent and not that of the owner, and that

Unless the charter excluded the master's power the owner could not forbid its use. The charter-party recognizes that liens may be imposed by the charterer and allow to stand for less than a month, and there seems to be no sufficient reason for supposing the words not to refer to all the ordinary maritime liens recognized by the law. The statute had given a lien for supplies in a domestic port, and therefore had made that one of these ordinary liens. Therefore the charterer was assumed to have power to authorize the master to impose a lien in a domestic port, and if the assumption expressed in words was not equivalent to a grant of power, at least it cannot be taken to have excluded it. There was nothing from which the furnisher could have ascertained that the master did not have power to bind the ship.

11. Not Sole Remedy.—The reader will not be misled into supposing that the absence of a right to a maritime lien means that the debt is uncollectible by legal process. While the admiralty court is closed to the creditor if there be no right to a maritime lien, he has the same remedy as any other creditor by a suit at law to recover the debt or damage from the debtor, or person liable, i. e., the owner, the temporary owner, or the person who ordered the goods or did the damage as the case may be. Such a remedy lacks the peculiar advantages of the maritime lien (§ 2 *supra*, this chapter). There may also be special remedies open to him under state statutes (but see § 13, this chapter).

12. How Divested.—Maritime items are only completely divested by payment or by an admiralty sale. Laches—that is to say delay or sloth—on the part of the lienor may prevent their enforcement against the rights of subsequent lienors or purchasers for value in good faith, but the ship is really only absolutely free from them when she has passed through a sale in proceedings *in rem*—that is, a suit against the ship. This transfers all claims

to the proceeds in the registry of the court and passes a clear title to the purchaser. The *Garland*, 16 Fed. 283, is illustrative; she had sunk a yacht in the Detroit River with great loss of life; her business was that of a ferry between Detroit, Michigan, and Windsor, Ontario, and her value was about \$20,000; libels were filed against her in Detroit on account of the collision and she was then arrested in Windsor, by process from the Maritime Court of Ontario, for a coal bill of \$36.30; that court sold her in accordance with the usual admiralty practice. She then resumed her business and was arrested under the Detroit libels. These were dismissed by the United States court because all liens had been divested by the admiralty sale in Ontario and such sales are good throughout the world. No other sales, judicial or otherwise, have this effect since they convey only the title of the owner in the thing and not the thing itself. Maritime liens, therefore, are not divested or affected by the foreclosure of a mortgage, or a sheriff's sale on execution, or a receiver's sale, or any other form of conveyance of an owner's title. Nor are they divested by a writ of execution issued out of a court of common law, nor postponed to such execution. This has been held, even where the execution was in favor of the government.

13. State Liens.—For many years there was an open question in the maritime law of the United States as to the status of liens which arose in the home port of the vessel and numerous conflicting decisions were made by the courts. The effect was that in all cases of liens arising out of contract, like supplies and repairs, the question of upon whose credit the work was done and the supplies furnished became very important; where the transaction was in the home port, there was a presumption that it was on the personal credit of the owner and no lien was allowed; and the theory of home port became extended to include the entire State in which the owner resided. Thereupon all of the states interested in maritime affairs enacted statutes providing for liens upon vessels, both maritime and nonmaritime in their nature, and a sort of admiralty proceeding against the ship to enforce them; the procedure portions of these statutes were generally held void as interfering with the exclusive jurisdiction *in rem* of the Federal courts, but the liens which they created, if maritime in their nature, were usually enforced. By the act of Congress of June 23, 1910 (as amended and reenacted by the Merchant Marine Act of 1920,

see Appendix), relating to liens on vessel for repairs, towage supplies or other necessities, it was declared unnecessary to allege or prove that credit had been given the vessel and also provided that the Act shall supersede the provisions of all state statutes conferring liens on vessels so far as they purport to create rights *in rem*, that is to say, rights against the vessel herself. It is yet unsettled whether those of a non-maritime class survive, as in the case of the lien for shipbuilding which, not being regarded by the admiralty as maritime, has been enforceable under the state statutes.

14. Builders' and Mechanics' Liens.— These may arise upon a ship under the provision of local statutes and be entirely enforceable so long as they do not come into conflict with maritime liens and the exclusive jurisdiction of the admiralty. So, also, a lienor may assert his common-law right to retain possession of the ship until payment is made. This depends entirely on possession and cannot be enforced by judicial proceedings, although it may be recognized by the court when it arrests the vessel on other accounts.

15. Foreign Liens.— Maritime liens often depend on the law of the place in which the obligation is incurred and also upon the law of the ship's flag. In other words, inquiry must frequently be made whether the local law gives a lien, whether the law under which the ship sails gives the master power to create the lien, and whether the country in which the suit is commenced has the legal machinery to enforce the lien. There is no doubt about our own admiralty courts having adequate jurisdiction and equipment to enforce any maritime lien which exists by the law of a foreign country. Its enforcement is a matter of comity and not of right when the parties are foreigners. Thus the maritime lien for collision will generally be enforced wherever the offending ship may be seized, irrespective of the place where the collision occurred. That lien exists by virtue of the general maritime law. On the other hand, there may be a closer question in regard to the lien for supplies. They may be furnished in a port of a country whose laws do not provide such a maritime lien but only give a remedy by attachment of the ship. The tendency of the weight of authority is to enforce such liens in the courts of this country whenever they exist by virtue of the general maritime law, even

if they could not be enforced in the courts of the country where they arose. Possibly this gives a foreigner an advantage here over what he would have at home, but this is not really material.

16. Enforcement of Liens.— This is discussed in Chapter XVII, Admiralty Remedies.

REFERENCES FOR GENERAL READING

Admiralty, Hughes, Chapter XVII.

Admiralty Liens of Material Men, IX American Law Review, 654.

Features of Admiralty Liens, XVI American Law Review, 193.

Maritime Liens, 4 Law Quarterly Review, 379.

Priorities among Maritime Liens, II University Law Review, 122.

The DeSmet, 10 Fed. 483 (excellent annotation).

Lottawanna, 21 Wall. 558.

John G Stevens, 170 U. S. 113.

CHAPTER X

MORTGAGES AND BONDS

1. **Definitions.**— A vessel mortgage is a conveyance of the ship as security. A bottomry bond is a contract in the nature of a mortgage by which the ship is pledged as security for the repayment of money borrowed and the lender assumes the risk of loss if the ship does not survive in consideration of maritime interest, usually at a high rate. Respondentia is a loan on the cargo, to be repaid if the goods arrive, but, if lost, the borrower is exonerated. Like bottomry, it is essentially a loan without personal liability beyond the value of the property mortgaged. Vessel bonds are a modern form of security in the form of debentures of the owner, carrying interest coupons and secured by a trust deed or mortgage of the ship.

2. **Bottomry Bonds.**— The name of this class of security on the ship arose from the fact that the bottom or keel of the ship was figuratively used to express the whole and to indicate that the entire vessel secured the loan. The repayment of money borrowed on bottomry depends on the safe arrival of the ship; if she is lost the loan is lost with her. The money is at the risk of the lender. Under an ordinary mortgage, the borrower must pay at all events and his personal liability survives the loss of his vessel. Under bottomry, the risk is shifted. In consideration of this risk, the lender is permitted to charge a high rate of interest without violating the law of usury. Rates of interest as high as 25 per cent. and higher have been upheld, and while in some cases the courts have ordered a reduction in the rate when it was regarded as clearly extortionate, the strong inclination of the courts is to carry out the bargain as made by the parties. The bond must be in writing. No particular form is essential but it must rest on the assumption of maritime risks by the lender or it will be no bottomry. It may be expressed after the precedent of a common-law bond, with a recital of the circumstances, provisions showing that the usual risks are on account of the obligee; and stipulations providing that the condition of performance or discharge is the safe arrival of the ship at her designated haven. The lender may

secure himself against loss by taking out insurance. Such bonds may be made by the owner, in the home port, although this is not usual. He may, of course, make them anywhere. The master, however, can only do so as in cases of great necessity and the absence of the owner. His power, in this respect, is like his power to sell. His first duty is to obtain funds on the personal credit of the owner. The duty of the master to communicate with the owner, if possible, before giving a bottomry bond is the same as his duty to communicate before selling the vessel (Chapters II, § 14; IV, § 9). For this reason and in view of modern facilities for communication the giving or making of bottomry bonds by masters has, like the sale of a vessel by her master, become rare in modern times.

A good illustration of a bottomry bond is found in the case of the *Grapeshot*, 9 Wall. 129. There the libel recited that the *Grapeshot* was at Rio de Janeiro in April, 1858, was in great need of reparation, provisions and other necessities to render her fit and capable of proceeding to New Orleans, the master having no funds or credit in Rio de Janeiro, and the owner not residing there and having no funds or credit there, the libellants at the request of the master loaned him \$9,767.40, on the bottomry and hypothecation of the bark at the rate of 19½ cents, maritime interest; that the master did expend the sum borrowed for repairing, victualing and manning the bark to enable her to proceed to New Orleans and that she could not possibly have proceeded with safety without such repairs and other necessary expenses attending the refitting of her. Chief Justice Chase described the general characteristics of a bottomry bond as follows:

A bottomry bond is an obligation, executed generally, in a foreign port, by the master of a vessel for repayment of advances to supply the necessities of the ship, together with such interest as may be agreed on; which bond creates a lien on the ship, which may be enforced in admiralty in case of her safe arrival at the port of destination; but becomes absolutely void and of no effect in case of her loss before arrival.

Such a bond carries usually a very high rate of interest, to cover the risk of loss of the ship as well as a liberal indemnity for other risks and for the use of the money, and will bind the ship only where the necessity for supplies and repairs, in order to the performance of a contemplated voyage, is a real necessity, and neither the master nor the owners have funds or credit available to meet the wants of the vessel.

The Court also quoted with approval the decision in the old case of the *Aurora*, 1 Wheat. 96, in which it was said :

To make a bottomry bond, executed by the master, a valid hypothecation, it must be shown by the creditor that the master acted within the scope of his authority ; or, in other words, that the advances were made for repairs or supplies necessary for effecting the objects of the voyage, or the safety and security of the ship. And no presumption should arise in the case that such repairs or supplies could be procured on reasonable terms with the credit of the owner, independent of such hypothecation.

And in summarizing the conclusion reached in the case it was said :

To support hypothecation by bottomry, evidence of actual necessity for repairs and supplies is required and, if the fact of necessity be left unproved, evidence is also required, of due inquiry and of reasonable grounds of belief that the necessity was real and exigent.

These bonds are not required to be placed on record but great diligence should be employed in enforcing them so that the rights of innocent purchasers or subsequent lienors may not be impaired.

3. Respondentia.— This is security for a loan on marine interest created on the cargo. It may be created by the cargo-owner, at home, if he sees fit, but ordinarily, only arises out of necessity during the course of the voyage. The master has the same authority to borrow on the security of the cargo as he has in cases of bottomry. The proceeding must be sanctioned by great necessity and liability to communicate with, or obtain relief from, the owner of the goods. The duty of communication is the same as in the case of bottomry bonds (see preceding sections). The rule with respect to interest is the same as that governing bottomry bonds. The instrument may be in any form which expresses the facts and conditions ; an ordinary bill of sale may be used or the form of a bottomry bond. The instrument is not required to be recorded.

The case of *Ins. Co. v. Gossler*, 6 Otto 645, contains an example of a bond, which was both bottomry and respondentia. The bark *Frances* en route from Java to Boston with a cargo of sugar encountered a hurricane which compelled the master to cut away her mast to save the vessel and put into Singapore for repairs. Destitute of funds and without credit, the master executed a bond with maritime interest at 27½ per cent., secured upon the boat, cargo and freight. When nearing the completion of her voyage the bark was cast away on the shore of Cape Cod. She could not

be salvaged as an intact vessel, but was sold as a wreck and subsequently broken up by the purchaser in order to make use of the parts of her. Some of her cargo was saved. The Court held that the salvaged portion of the cargo and the wreck as she lay on the beach must respond to the obligation of the bond, saying that nothing but an utter annihilation of the thing hypothecated would discharge the borrower on bottomry, the rule being that the property saved, whatever it may be in amount, continues subject to hypothecation.

Unless the ship be actually destroyed and the loss to the owners absolute, it is not an utter loss within the meaning of such a contract. If the ship still exists, although in such a state of damage as to be constructively totally lost, within the meaning of a policy of insurance; . . . she is not utterly lost within the meaning of that phrase in the contract of hypothecation.

Thus, the doctrine of "constructive total loss," which is important in the law of marine insurance, has no application to bottomry. It is customary in bottomry and respondentia bonds to insert a clause reserving to the lender, in case of utter loss, any average that may be secured upon all salvage recoverable.

4. Necessity for Advances.—The lender of money on a bottomry bond is under obligation to satisfy himself that the supplies or refitment for which the money is borrowed are necessarily required by the vessel. The act of June 23, 1910 (discussed in § 9 of preceding chapter), apparently has no application to money advanced on bottomry bonds and certainly has no application to respondentia bonds. If the actual need for the advance sought to be secured by the bottomry or respondential bond does not exist, the bond will not constitute a lien upon the vessel or cargo.

5. Mortgages.—These are species of chattel mortgages. The ship is a chattel or personal property, for many purposes. Prior to June 5, 1920, these mortgages were not recognized as maritime transactions. The Merchant Marine Act of that date makes radical changes in the law governing ship mortgages. The new provisions are to be found in Section 30, which is to be cited, independently of the rest of the statute, as the "Ship Mortgage Act, 1920," and is printed in full with the rest of the Merchant Marine Act in the Appendix.

6. Are Mortgages Maritime Contracts?—An ordinary mortgage upon a vessel, whether made to secure the purchase money

or to obtain funds for general purposes, is not a maritime contract. This is the rule in this country, as announced by the Supreme Court in the *J. E. Rumbell*, 148 U. S. 1, although it is different under the general maritime law in other countries. Accordingly, courts of admiralty in the United States, have no jurisdiction of a libel to foreclose a mortgage or to enforce title or right to possession under it. If, however, the ship has been sold under admiralty process, and there are proceeds in the registry after satisfying maritime liens, the court will pay over the surplus, to a mortgagee in preference to the owner or general creditors.

The Ship Mortgage Act (*supra*) makes a sweeping exception to the foregoing rule in cases of American vessels where the mortgagee is an American citizen and where the parties fulfill certain formalities required by the Act and discussed in the next section. The Act provides that these mortgages shall be known as "preferred mortgages" and confers upon the courts of admiralty exclusive jurisdiction to foreclose them. There has yet been no judicial interpretation of this Act. Some doubt may be entertained whether it is within the power of Congress to convert ship mortgages into maritime contracts; that is to say, can Congress take a transaction, which has always been regarded as wholly foreign to the admiralty and confer upon it a maritime quality? The decision of this point is of the utmost importance and will be awaited with the greatest concern by every one interested in ships and shipping.

7. When Postponed to Other Liens.—An ordinary vessel mortgage is a very inferior grade of security because it is subordinate to all maritime liens and has only a qualified and dubious standing in the only courts which enforce them. One who advances money to a ship or her owner on mortgage is bound to know that the ship navigates on credit, and must continue to accumulate liens in order to earn freight, and that she may be pledged for bottomry or incur liability for torts. He is therefore postponed to sailors' wages, salvage, towage, advances, bottomry, general average, repairs, supplies, collision, personal injury, damage to cargo, breach of contract, penalties, and liens created by local law which the admiralty will enforce.

Here again the Ship Mortgage Act, 1920, makes a radical change in the case of "preferred mortgages" given upon American vessels to secure American investors. The Act makes the

lien of a "preferred mortgage" inferior to liens of prior date and liens for damages arising out of tort, for wages of stevedores when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of crew, general average and salvage, including contract salvage; but superior to all other liens, such for example as repairs, supplies, towage, pilotage, etc.

8. Form.— No particular form is essential to a vessel mortgage except that the requisites of the Federal Statutes in regard to recording and conveyance must be observed if it is to be placed on record in the office of a collector of customs. They require that every instrument in the nature of a bill of sale or other conveyance or incumbrance of any ship or vessel, shall be duly acknowledged before a notary public or other officer authorized to take acknowledgments of deeds (7 U. S. Comp. St. §§ 7778, 7779). It should contain a copy of the last certificate of registration or enrollment. Government blank mortgages can usually be obtained at the custom house and are preferred, although any instrument following their general form will be sufficient. A bill of sale may be used, although absolute in its terms, and the fact that it is only security can be shown by parole.

Trust-deeds or mortgages securing issues of bonds are in general use where large amounts are involved. These forms are very elaborate and resemble railroad mortgages in their elaborate details. In all vessel mortgages, important provisions are those in regard to the insurance, the amount of liens which the ship may incur, the waters which she may navigate, and the rights of the mortgagee on default. It is desirable to provide for contingencies, as far as possible, by clear and definite agreements in the instruments.

To entitle a mortgage of an American vessel to an American mortgagee to the status of a "preferred mortgage" under the Ship Mortgage Act, 1920, giving its lien the superiority described in the preceding section, it is necessary that it should be recorded; that an affidavit be filed at the time of recordation to the effect that the mortgage is made in good faith and without design to hinder, delay or defraud any existing or future creditor of the mortgagor or any lienor; and that there be endorsed upon the ship's documents the names of the mortgagor and mortgagee, the time and date of the endorsement; the amount and date of the

maturity of the mortgage. The formalities to be observed in the creation of "preferred mortgages" are described in detail in the Act which is printed in full in the Appendix and should be observed with scrupulous exactness.

9. Recording.—No mortgage of any vessel of the United States is valid against third parties unless it is duly recorded in the office of the collector of customs where such vessel is registered or enrolled. She must be registered or enrolled by the collector of that collection district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel usually resides. Unless a mortgage is properly recordable in the custom house, the mere fact that it is recorded there is insufficient to give it validity against others than the mortgagor. Record in the wrong office and premature record in the right office are equally invalid. Thus a mortgage was held bad against general creditors in the case of the Empire Shipbuilding Company, 221 Fed. 223, where it was made before the ship was completed and recorded on the same day she was enrolled. The proper course would have been to first enroll the ship as a vessel of the United States and then execute and record the mortgage. As we have observed in Chapter II, § 16, *supra*, where a vessel at sea is mortgaged it is wise, in order to be safe until she returns, to record the mortgage at the home port, as shown by her outstanding document, as well as at the new home port if there is to be a change of home port.

10. Rights of Mortgagee.—These depend principally upon the stipulation in the mortgage. He is entitled to have his security made available to the satisfaction of his debt, but, until foreclosure, the ship is subject to many claims which may impair or destroy its value. If seized by admiralty process, the mortgagee may appear and protect his interest, as by taking possession under the usual claim and bond. Seizures or levies under local law are subject to the rights of the owner of a valid mortgage. Generally, the terms of the instrument will provide that, upon any default by the mortgagor or impairment of the security by acts of third parties, the mortgagee may take possession, declare the entire debt due, and foreclose. Where maritime liens affect the security, the mortgagee is entitled to pay them and be subrogated thereto, that

is to say, after discharging the liens, he stands in the shoes of the lienors. Where the ship has been arrested and sold by a court of admiralty, and its proceeds are in the registry, he may appear and file an intervening petition for the protection of his interest therein. Where the admiralty disclaims jurisdiction over vessel mortgages, it will pay over surplus proceeds to the mortgagee in preference to the owner or the owner's general creditors. So the mortgagee may answer and contest the claims of the lienors in their proceedings against the ship.

11. Liabilities of Mortgagee.— A mortgagee in possession of the ship becomes liable as owner for supplies furnished or repairs made at his request or at the request of those apparently authorized to act for him. So, if he operates the ship, he will be liable for the risks and expenses of the voyage.

12. Transfer and Payment.— A vessel mortgage may be assigned or transferred like other similar forms of security. If the debt is evidenced by negotiable promissory notes or bonds, the transfer of them carries with it the security, although the more usual and convenient way is by a formal assignment of mortgage placed on record with the collector. The assignee succeeds to all the rights of the original mortgage. So the mortgage may descend to heirs or pass to creditors like other personal property, in accordance with the law of the owner's domicile.

On payment of the debt, the mortgage is automatically canceled and the mortgagor is entitled to have the fact placed upon the records by the usual certificate of payment and discharge.

In the case of "preferred mortgages" under the Ship Mortgage Act, 1920, the ship's documents may not be surrendered (except in case of forfeiture or judicial sale) without the approval of the Shipping Board which will be withheld unless the mortgagee consents, and the interest of the mortgagee will not be terminated by a forfeiture of the vessel unless the mortgagee was implicated in the act which caused the forfeiture. No rights under any mortgage of an American ship, whether preferred or not, may be assigned to any person not a citizen of the United States without the approval of the Shipping Board.

13. Foreclosure.— A mortgage upon an American vessel, although necessarily recorded according to Federal law, is still only a chattel mortgage for many purposes and must be foreclosed in accordance with local law. This will be in one of three ways:

by a suit in a court of competent jurisdiction to obtain a decree of foreclosure and sale, by a sale in accordance with local statutory provisions in respect of chattel mortgages, by exercise of the power of sale which is usually contained in the instrument itself. The last is the method best adapted to vessel property and carefully drawn mortgages usually contain plain and adequate provisions for that purpose. If, however, the mortgagee be an American citizen and the requirements of the Ship Mortgage Act, 1920, with reference to "preferred mortgages" have been complied with, the foreclosure proceeding is to be instituted in a United States District Court sitting in admiralty, and no one except an American citizen may purchase an American ship at a sale by admiralty decree in a suit *in rem*. The mortgagor's title can only be extinguished by foreclosure but stipulations giving the mortgagee the power, on breach of condition, to dispose of the mortgaged property, at public or private sale, and after applying the proceeds to his expense and debt, to account for the surplus to the mortgagor, are valid and may be executed without resort to a court. The mortgagor may appoint the mortgagee, as well as any other person, to sell his property for the purpose of satisfying his debts. The mortgagee should proceed strictly in accordance with the power of sale and carefully observe its terms in regard to notice, time and place. The conduct and fairness of such sales are open to investigation at the instance of the mortgagor and will be set aside on proof of unfair or oppressive conduct or deviation from the terms of the power or statute. It is not necessary to hold the sale on board the ship if the mortgage provides another place, but, in the absence of such a provision, it would be safer to so make the sale as there are authorities holding that the mortgaged property must be in view when the sale is made. There are numerous rules in the general law of foreclosure of chattel mortgages which are quite inapplicable to ships and much embarrassment may be avoided if the instrument is drafted with these in mind. The courts will enforce the contract as the parties make it, if its provisions are plain and are carefully observed. As in other cases, the sale may be adjourned from time to time and the mortgagee may employ an agent or attorney to make it. The debt may be used instead of money; the mortgagee may bid in the property himself and execute an appropriate bill of sale. The power of sale is merely cumulative and will not prevent a suit for

foreclosure or an action at law on the debt. The sale is, of course, subject to all maritime liens superior to the mortgagee, but will extinguish all subordinate liens and subsequent titles if the mortgage was duly recorded.

Where an American ship subject to a "preferred mortgage" is sold at an admiralty sale at the suit of a lienor whose lien is inferior to that of the mortgage, the Ship Mortgage Act, 1920, provides that the vessel shall be sold free from all pre-existing claims, but the court shall, at the request of the mortgagee, the libellant or any intervenor, require the purchaser to give and the mortgagor¹ to accept a new mortgage of the vessel for the term of the original mortgage, and in that case the mortgagee shall not be paid from the proceeds of the sale and the purchase price shall be diminished in the amount of the new mortgage debt.

REFERENCES FOR GENERAL READING

Chattel Mortgages, Herman (1877), Chapter XIII.

Mortgages, Boone, § 254.

J. E. Rumbell, 148 U. S. 1.

Grapeshot, 9 Wall. 129.

Blake, 107 U. S. 418.

O'Brien v. Miller, 168 U. S. 287.

¹ Apparently a misprint in the act for mortgagee.

CHAPTER XI

COLLISION

1. **Definition.**— In maritime law, collision is the impact of ship against ship, although usage is increasing the scope of the word so as to include contact with other floating bodies. It does not include stranding or running into structures forming a part of the land, such as bridges and wharves.

The question whether a collision is a subject for adjudication in admiralty is frequently one of some nicety. What constitutes a vessel within the meaning of admiralty jurisprudence has been discussed in Chapter 1, § 4.¹ While, in general, objects which come into collision must be afloat in the water to warrant recourse to the admiralty courts, and certainly must not be permanently attached to the shore, nevertheless the jurisdiction has been exercised when the collision was between a barge and a pier erected in the midst of a stream and unlawfully obstructing navigation. *Atlee v. Union Packet Co.*, 21 Wall. (U. S.) 389. The jurisdiction has also been exercised where boats have come into collision with submerged and stranded wrecks and sunken articles.

2. **Liability Dependent on Negligence.**— Liability for collision depends on negligence or fault causing or contributing to the disaster. Such negligence may be on the part of the ships actually in contact with each other or of outside vessels and consists in the violation of the statutory regulations for preventing collisions at sea or the failure to exercise that skill, care, and nerve ordinarily displayed by the average competent master. Collisions may occur without negligence, or by inscrutable fault, and then there is no liability for the resulting damage. Such are collisions solely due to the darkness of the night or to storms. In the *Morning Light*, 2 Wall. 550, the collision occurred at 4 A. M., on an intensely dark night in a dense fog and rain. The court (Clifford, J.) said:

¹ In *Seabrook v. Raft*, 40 Fed. 596, where there was a collision between a raft and a dredge, moored by six anchors, the jurisdiction was sustained.

Reported cases where it has been held that collisions occurring in consequence of the darkness of the night and without fault on the part of either party, are to be regarded as inevitable accidents are numerous.

Where the loss is occasioned by a storm or any other *vis major*, the rule as established in this court is, that each party must bear his own loss, and the same rule prevails in most other jurisdictions. . . . Different definitions are given of what is called an inevitable accident, on account of the different circumstances attending the collision to which the rule is to be applied.

Such disasters sometimes occur when the respective vessels are each seen by the other. Under those circumstances, it is correct to say that inevitable accident, as applied to such a case, must be understood to mean a collision which occurs when both parties have endeavored by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident. When applied to a collision, occasioned by the darkness of the night, perhaps a more general definition is allowable. Inevitable accident, says Dr. Lushington, in the case of the *Europa*, 2 Eng. Law & E. 559, must be considered as a relative term, and must be construed not absolutely, but reasonably with regard to the circumstances of each particular case. Viewed in that light, inevitable accident may be regarded as an occurrence which the party charged with the collision could not possibly prevent by the exercise of ordinary care, caution and maritime skill.

3. Tests of Negligence.—The primary question is whether there has been a violation of any of the regulations or rules of navigation. Navigable waters constitute a common highway and the rights and duties of vessels using them are quite similar, in legal principles, to those of vehicles using streets, and roadways on the land. Hence the general maritime law recognized the practice of keeping to the right, avoiding others whose movements were hampered, and not running down another because he was on the wrong side. Ultimately the general practice of navigators was expressed in formal rules and finally all nations united in promulgating them in the form of statutes which are now practically uniform throughout the world. They are, in effect, a code of international law for the purpose of avoiding collisions. Back of these special rules are the general requirements of the maritime law in regard to careful navigation; a lookout is essential although there is no statute requiring one to be maintained.

It should be observed that vessels navigating in darkness, fog

or storm must take all precautions against collision which such a state of things would suggest to a prudent navigator. A vessel failing to take such precautions will be in fault in a collision. Failure to hear fog signals is not negligence. The ordinary steering and sailing rules do not apply in fog.

4. The Regulations.—The express rules for the navigation of vessels of the United States consist of the following:

1. International Rules (Act of Aug. 19, 1890, as amended; U. S. Comp. St. 1916).
2. Rules for Great Lakes and connecting waters (The "White Law"; Act of February 8, 1895; U. S. Comp. St. (1916).
3. Rules for Harbors, Rivers and Inland Waters (Act of June 7, 1897; U. S. Comp. St. 1916).
4. The Mississippi Valley Rules, § 4233, Revised Statutes.
5. Rules of Supervising Inspectors.
6. Local rules and municipal regulations.

These rules deal with the distinctive lights required for different vessels, signals, speed, rules governing the management of sailing and steam vessels under different conditions of weather and various relative positions of vessels. While they have very often been the subject of judicial interpretation in collision cases their application belongs to the subject of navigation rather than to that of admiralty law in the present work.

The statutory rules are of the highest importance and the mere fact of a breach of any of these is *prima facie* (but not conclusive) evidence of negligence. The infringing vessel must satisfy the court that its violation of law not only did not, but could not, contribute to the collision.

As was said by Chief Justice Fuller in *Belden v. Chase*, 150 U. S. 674:

They are not mere prudential regulations, but binding enactments, obligatory from the time that the necessity for precaution begins, and continuing so long as the means and opportunity to avoid the danger remains. Obviously they must be rigorously enforced in order to attain the object for which they were framed, which could not be secured if the masters of vessels were permitted to indulge their discretion in respect of obeying or departing from them. Nevertheless, it is true that there may be extreme cases where departure from their

requirements is rendered necessary to avoid impending peril, but only to the extent that such danger demands.

Obedience to the rules is not a fault even if a different course would have prevented the collision, and the necessity must be clear and the emergency sudden and alarming before the act of disobedience can be excused. Masters are bound to obey the rules and entitled to rely on the assumption that they will be obeyed, and should not be encouraged to treat the exceptions as subjects of solicitude rather than the rules.

It is true that where obedience to the rules will result in collision a navigator is justified in disobeying the rule. It was held in the *Oregon*, 158 U. S. 186, "that the judgment of a competent sailor *in extremis* cannot be impugned." Cases in which disregard of the rules has been upheld as justifiable by the courts have generally been cases in which the other vessel has already infringed a rule and a situation has arisen in which obedience to the rule could only result in collision. Such exceptions, however, as was said in the *Albert Dumois*, 177 U. S. 240, "are admitted with reluctance on the part of the courts, only when the adherence to such rules must almost necessarily result in a collision—such, for instance, as a manifestly wrong maneuver on the part of an approaching vessel." In the *John Buddle*, 5 Notes of Cas. 387, it was said:

All rules are framed for the benefit of ships navigating the seas, and no doubt circumstances will arise in which it would be perfect folly to attempt to carry them into execution, however so wisely framed. It is, at the same time, of the greatest possible importance to adhere as closely as possible to established rules and never to allow a deviation from them unless the circumstances which are alleged to have rendered such deviation necessary are most distinctly approved and established; otherwise, vessels would always be in doubt and go wrong.

5. Damage to Ship.—The owner of a ship wrongfully injured by collision is entitled to complete restitution. If the loss is total, he recovers her value, with interest from the date of the loss. If the loss is partial, he will recover the cost of full and complete repairs and if such repairs make the vessel a better and stronger one than she was before, he is entitled to that benefit; he will also recover demurrage or compensation for the loss of use of his ship during the time occupied by the repairs.

It frequently happens that the ship is not an absolute total loss,

in the sense of being completely destroyed or sunk beyond possibility of recovery, but so injured that the cost of repair will exceed the value at the time of collision; the owner may then treat her as a constructive total loss and claim from the wrongdoer the same amount as if the destruction had been complete. In other words, when the ship is so injured that a prudent business man would not repair, the owner abandons the wreck and claims a total loss. If he recovers, the title to the wreck passes to the wrongdoer.²

Expenses incident to the collision are also included in the ship's damage, such as the owner's disbursements in looking after his property; the cost of protest and survey; the wages and board of the crew while necessarily kept on board, the costs of superintending repairs and securing a new rating.

Loss of freight is also an item of damage.

6. Damage to Cargo.—The cargo-owner is entitled to recover his damages from the offending ship and the ordinary measure is the value of the goods at the time and place of a total loss, with interest and incidental expenses. The purpose of the rule is to place him, as nearly as may be, in the same position as if the collision had not occurred. Where the loss is partial, as where the goods arrive in a damaged condition, the measure is the difference between their actual value and what they would have been worth in good condition; to this may be added, in appropriate cases, the expenses of transshipment, reconditioning, warehousing, survey and sale.

Where both vessels are in fault the owner of the cargo may sue either or both, or as was said by Justice Clifford in the *Atlas*, 3 Otto 302:

Parties without fault such as shippers and consignees, bear no part of the loss in collision suits, and are entitled to full compensation for the damage which they suffer from the wrongdoers, and they may pursue their remedy *in personam*, either at common law or in the admiralty, against the wrongdoers or any one or more of them, whether they elect to proceed at law or in the admiralty courts.

Innocence entitled the loser to full compensation from the wrongdoer, and it is a good defense against all claims from those who have

² In modern practice, insurance is nearly always carried upon a vessel and cargo. The modern authorities on the subject of constructive or total loss and abandonment, as well as the items of damage recoverable on account of vessel and cargo are, in nearly every instance, cases arising out of policies of marine insurance. This subject is treated at large in another volume of this series.

lost. Individual fault renders the party liable to the innocent loser, and is a complete answer to any claim made by the faulty party, except in case where there is mutual fault, in which case the rule is that the combined amount of the loss shall be equally apportioned between the offending vessels.

In the foregoing case the owner of a cargo, lost in a collision in which both vessels were held to be at fault, libeled one of them and decreed his entire damage against the vessel which he sued. A vessel so compelled to pay the whole damage to cargo, in a case of mutual fault, is entitled to recover from the other vessel a contribution so as to equalize the loss as between the two ships.

But this important qualification of the foregoing rule must be observed: That a shipper of cargo who is prevented from recovering against the vessel on which his cargo was shipped, as for instance by his contract of affreightment, or by some rule of law, as, for example (in an applicable case), the Harter Act, cannot hold the other vessel for the entire damage but only for one-half thereof.

In the case of the *Niagara*, 77 Fed. 329, the steamer *Niagara* was in collision with the bark *Hales*, the Court held:

Both vessels being, therefore, in fault, the owners of the bark are entitled to recover against the *Niagara* one-half their damages for the loss of the bark, to be applied so far as may be legally applicable and necessary in payment of the value of one-half of the cargo claimed under the other libel; and the *Niagara* is liable for any deficiency to make good the whole value of the cargo owners; as well as for one-half the claims for personal effects.

If the Harter Act, however, were applicable, it would not affect the liability of the *Niagara* in the present case; but only the application, as between the shipowner and the owners of the cargo, of the sum the *Niagara* must pay. The *Niagara* suffered but little damage; while the loss of the *Hales*, and of the cargo, are estimated to have been respectively about \$16,000 and \$26,000. In applying the Harter Act to cases of division of damages for mutual fault, I have heretofore held (1) that it was not the intent of Congress to relieve the carrier vessel at the expense of the other vessel in fault, by increasing the latter's liability, but that the intent was that the cargo should bear the consequences of the carrier's neglect in navigation; (2) that the relief given by the Act to the carrier vessel from responsibility for damage to her cargo, could not be nullified indirectly by a charge against her in the shape of an offset in favor of the other vessel in fault on account of that same cargo; (3) that the extent of the lat-

ter vessel's previous liability on the particular facts of each case was not to be diminished by the Harter Act from what she would previously have been bound to pay, except as respects her own cargo; and (4) that the result, therefore, must be that the cargo owner of each ship must stand charged under the Harter Act with so much of the cargo damage as the carrier ship is relieved from by that Act, whenever and so far as that is necessary to avoid any increase in the previous liability of the other ship. *The Viola*, 60 Fed. 296.

Upon any complication, the first inquiry is, to what amount was each vessel, or her owner, liable under the previous law, upon the particular facts of the case? Under the Harter Act, if it is applicable, that liability cannot be exceeded, and it will remain the same, if necessary to make good the damage to the cargo of the other ship. In getting at the amount which either vessel is to pay under the Harter Act, her own cargo is to be treated as nonexistent; because where the Harter Act is operative the carrier vessel (A) is not liable for that item of damage. But the other ship (B) is bound to pay that item of cargo loss, as well as one-half the damage to the two ships, up to the limit previously ascertained, as above stated, if the remaining value of the ship (B) and her pending freight are sufficient for that purpose. Where this value is not sufficient, and the damage to the first vessel (A) is greater than the damage to the other ship (B), two conflicting claims arise, one in favor of the ship (A), for the purpose of equalizing the loss on the two vessels, and another claim for the loss on A's cargo. As those claims arise at the same time, and are of equal merit, the remaining value of the ship B and her pending freight should be apportioned pro rata, according to the amount of the two claims.

In the present case the *Hales'* loss was about \$16,000; that of her cargo about \$26,000. The loss on the *Niagara* was slight, and of her cargo, nothing. Before the Harter Act, the *Niagara*, upon the above figures, would have been obliged to pay \$8,000 for half the loss of the *Hales* (which would, however, have been applied upon the latter's liability to her cargo); \$13,000 for half the cargo loss, and \$5,000 in addition, on account of the total loss of the *Hales*, in order fully to indemnify the cargo, making \$26,000 in all (*The Atlas*, 93 U. S. 302). Under the Harter Act, the *Hales* being relieved from any liability to her cargo for this damage, her owners would retain the \$8,000 for their own use, instead of applying it on the cargo as before; but the *Niagara's* liability is not to be thereby increased or diminished. This item of loss is transferred by the Harter Act to the cargo. The *Niagara* must pay, therefore, as before, \$13,000, and the \$5,000 (that is, \$18,000), on account of the cargo loss, and the cargo-owner loses the \$8,000, which his carrier under the Harter Act is entitled to retain. It is immaterial, therefore, to the *Niagara* whether the Harter Act is applicable or not. It affects only the distribution of the \$26,000.

7. Damage to Crew and Passengers.— Personal belongings of crew and passengers may be lost or injured in the collision and the measure of damages is the same as in the case of the cargo. If totally lost, the value at the time of the collision governs not what the articles originally cost when new. If only injured, then the difference between sound and damaged condition controls. Interest follows as in other cases.

Personal injuries and loss of life are also included in collision damage. The measure here is the same as in similar matters on land.

8. Contribution.— The 59th Rule in Admiralty provides that the claimant of any vessel proceeded against, or any respondent proceeded against *in personam* may bring in a petition alleging fault in any other vessel contributing to the collision, and praying that such other vessel be made a party to the suit. The other parties to the suit are to answer the petition and the vessel or party newly brought in shall answer the libel. This brings in both vessels, provided the vessel so brought in is within the jurisdiction of the court and can be reached by its process, and makes it possible for the court to enforce appropriate contribution of damage by the parties in fault.

Since we have already seen that, in a case in which both vessels are in court in the first place, the court will decree contribution, there remains only the case in which a claimant of lost cargo has brought suit against one vessel or her owner, and the other vessel cannot be reached by process of the court. Suppose that in such a case the cargo-owner gets a decree against the vessel or party defendant and for his full damage, can the vessel or the party thus mulcted maintain an independent suit for contribution against the other offending ship? It can only be said that on this point the authorities are in direct conflict; however, in the modern case of *Lehigh Valley R. R. Co. v. Cornell Steamboat Co.*, 218 U. S. 264, it seems to be clearly inferable that in the opinion of the Supreme Court of the United States such an action is maintainable.

What has been said with respect to damage suffered by owners of lost cargo, applies equally to damages for personal injuries sustained as the result of a collision.

9. Division of Damages.— Where both, or several, ships are in fault, the maritime law apportions the damage between them. When one of two vessels has suffered more than the other the

decree is against the one least injured for one-half of the difference in their respective losses. In the *North Star*, 106 U. S. 17, where both vessels were adjudged in fault for a collision and one, the *Ellis Warley*, became a total loss, the owners of the *Warley* advanced the ingenious argument that, inasmuch as their vessel had been entirely lost, they were entitled to limit their liability and, by so doing, recover one-half their entire damage from the *North Star*, without any deduction for the damage suffered by her, notwithstanding the rule of division of damage in such cases. It will be noticed that the vessel claiming the right to limit liability, being the greater sufferer, would, in no event, have been required to pay anything to the other, and that the *North Star*, which had to do the paying, did not claim any right to limit liability. In rejecting this argument and holding that the time to apply the limitation-of-liability rule was after the amount of the liability had been ascertained, when the party decreed to pay might claim the benefit of the rule if entitled to it, the Court entered upon an instructive review of the entire history of the division of damage, and found that the theory is not that the owner of the one vessel is liable to the owner of the other for one-half of the damage sustained by the latter, and *vice versa*, that the owners of the latter are liable to those of the former for one-half of the damage sustained by her; but that the joint damage is equally divided between the parties; that it is a case of average and is to be computed by subtracting the lesser loss from the greater, dividing the difference by two and directing the vessel sustaining the smaller loss to pay the other the amount so found.

Where both vessels are in fault and only one is injured, the uninjured vessel must pay to the other one-half of the amount of her damage without deduction.

The cargo, being innocent, may sue both vessels or either, but if the result is that one is so compelled to pay more than its proper proportion of the total, a suit for contribution under the conditions set forth in the preceding section will lie in order to accomplish an ultimate equality. The admiralty does not recognize the common-law rule that contributory negligence prevents recovery and the same division or apportionment of damage is applied to cases of personal injury in collision as otherwise.

10. *Lien*.—The party injured by collision acquires a maritime lien of high rank upon the guilty vessel which attaches at the mo-

ment the damage is done and inheres, as a property right, until it is satisfied, bonded, or extinguished by an admiralty sale, or abandoned by his own laches, or delay in enforcement. It attaches to the hull of the ship and also to her engines, boilers, boats, apparel and freight pending but not to her cargo and, equally, whether the offending ship was in actual contact with the other or whether she caused the collision between other ships by her own negligent navigation, as by suction or displacement waves. The lien will follow the ship into the hands of an innocent purchaser for value unless proceedings to enforce it have been unreasonably delayed or other circumstances render its enforcement inequitable. It has priority over almost all other maritime liens, only subsequent salvage and wages being ordinarily preferred.

Since the enactment of the act of March 30, 1920, a lien arises out of the loss of life in a collision, as in the case of personal injuries.

11. Limitation of Liability.—Where the owner of the offending vessel is not personally at fault for the disaster, his liability is limited to the value of his ship and freight pending, as of immediately after the disaster. If the ship is lost, his liability disappears with her. He is not, under American law, obliged to account for the insurance because that is not a part of the ship but the result of an independent, collateral contract.

12. Remedies.—The most usual remedy employed in cases of collision is that afforded by the Limited Liability Law.³ This gives the shipowner the right to call all damage claimants into one court and dispose of everything in a single proceeding, thus eliminating a multiplicity of suits in different jurisdictions. The question of fault may be litigated in this proceeding and it may be commenced either before or after the commencement of other actions. Injured parties, if they choose, may sue at common law as in other cases of negligence. The more effective remedies, however, are in admiralty. They may there proceed directly against the ship, or the ship and master together, or against the master or the owner alone, personally. The master of the injured ship may bring the suit in his own name on behalf of all concerned, including the cargo. Underwriters who have paid for losses caused by collision become subrogated to the rights of their assured and may sue accordingly.

³ See Chapter VIII, *supra*.

13. Evidence.— The party alleging negligence must bear the burden of proof in establishing it. He must show fault on the part of the other vessel as well as due care on his own. By act of Congress, approved September 4, 1890 (26 St. at L. 425), the so-called "Stand-By" act, failure of a vessel to stay by another vessel with which she has been in collision until there is no further need of assistance, raises the presumption that she is in fault for the collision. This presumption, however, is not conclusive, but may be rebutted by testimony. Cases of this kind appear to be inconsistent with the doctrine laid down in some of the earlier decisions and represent a modern tendency to extend the maritime jurisdiction. Sometimes the conceded facts establish a presumption of fault, as where a collision occurs with a ship properly at anchor or between steam and sail. This will usually appear on the pleadings. The facts at issue are shown by the testimony of those who saw or participated in the disaster. These generally come from the officers and crews of the vessels involved and every man ought to be accounted for. Extreme contradictions are to be expected in the evidence as there is a natural tendency on the part of sailors and passengers to be so loyal to their own ship as to impute every fault to the one which runs into her. The courts seldom attempt to reconcile conflicting testimony but frequently decide on the conceded facts and probabilities. The evidence of disinterested parties is of much weight.

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CHAPTER XII

TOWAGE AND PILOTAGE

1. **Definition.**—Towage is the service rendered by one vessel to another in moving her from point to point under ordinary circumstances of navigation. Pilotage is the navigation of a vessel by one having special knowledge of the waters, as pilot.

2. **Towage Service.**—This is rendered by the tug to the tow. Tugs are usually specially built and equipped for the business and supply a very important aid to commerce and navigation. The service is generally by contract or informal agreement and includes both the short work in shifting vessels in port and the long voyage and season contracts along the coast and in the canals and Great Lakes. It may be performed in various ways. Sometimes the tug is lashed to the tow and supplies motive power only and sometimes she pulls several vessels behind her upon hawsers from each to the other of great length. The legal relations, however, are usually the same.

The tug should be supplied with hawsers of sufficient strength to hold the tow in any weather which may be reasonably anticipated, unless the tow itself supplies them. Where the tug is given full control, it should arrange the order of towage and the distances apart. It should also arrange, by an understood code of signals, for shortening, lengthening, or casting off the lines, as exigencies of navigation may require. Vessels of heavy draft should be placed behind those of lighter draft. The speed of the tug should be such as is reasonably safe for the condition of the tow and sudden jerks and turns must be avoided. Disaster does not necessarily absolve the contract of towage. On the contrary, it is quite settled that it is the duty of the tug to continue to do all in its power to get its tow out of situations of difficulty and danger, short, of course, of sacrificing its own safety. It is not relieved from its obligation because unexpected difficulties occur and may not lightly abandon the tow to its fate. Extraordinary services under a towage contract may secure a salvage reward, but too great haste in abandoning it will impose a corresponding liability.

3. Compensation.—The rate of compensation is determined by express contract, or in the absence of such contract by the customary rates prevailing in the port or locality, and in the absence of contract or custom by the fair value of the service rendered. Unless the service performed amounts to a case of salvage the compensation will not be determined by the rules governing salvage. Towage services are presumptively a maritime lien on the tow, and where the owners of the tow contend that the service was performed upon their personal credit, instead of upon that of the vessel, they must affirmatively establish that fact (*Erastina*, 50 Fed. 126). The lien for towage and pilotage is in general superior to all liens except those for salvage and seamen's wages and "preferred mortgages" given on American ships pursuant to the Merchant Marine Act of 1920 (see Appendix). Thus the Court in the *Mystic*, 30 Fed. 73, said:

I am of the opinion that this claim of towage is and should be considered a maritime lien upon the schooner. It is a conceded fact in this case (and if it were not, probably the court would take notice of the usual course of maritime business in this port) that all vessels entering and leaving the port of Chicago are required by the ordinances of this city to do so in the tow of a tug; and the usual course of business is for the tug to take vessels in tow at some point outside of the entrance to the harbor, and tow them to the dock to which they are consigned. This class of service takes the place of the labor of the crew, and I can see no reason why it is not to be treated as next in rank, if not in the same order of priority, as seamen's wages. It is probably, however, more analogous in the nature of the service to pilotage, as the use of the tug dispenses with the necessity of a pilot to bring the vessel into the harbor and take her to her dock; and by such analogy ought undoubtedly to be subordinate to the seamen's wages. The court must take notice of the fact, that by the introduction of steam even sailing vessels have become largely dependent upon tugs and towing vessels to take them into and out of harbors; and this is specially necessary in a harbor like that of this city where there are long devious channels which can only be threaded by the aid of a tug, or the almost impracticable means of warping.

4. Duty of Tug.—The tug is not a carrier as to the tow but only a bailee. This means that it is not liable for accidents except as it is proved to have been negligent or wanting in ordinary care. While the relation depends on contract, the obligations are mostly those implied by law from the relations of the parties although they may vary them as they please by express agreement. In gen-

eral, the tug engages to make the trip or voyage without delay or deviation or undue peril; to be sufficiently equipped and manned and in all respects seaworthy; to exercise reasonable diligence and the ordinary skill of the profession; in case of storm or danger, to protect the tow, by seeking a port of refuge, or slowing, stopping, sounding, and otherwise exercising due care, until the occasion subsides. She is, however, only bound to do what is consistent with her own safety and may, therefore, abandon the tow when circumstances of great peril require it. The tug is bound to see that the tow is properly made up for the proposed voyage; to know the sailing qualities of the vessels in charge and the character of the waters, currents, harbors and shoals before them.

If the tow furnishes its own hawsers or towing lines, it must see to it that they are sufficient for all the purposes of the voyage and that they are properly fastened on board. There is an implied representation of seaworthiness in offering a vessel to be towed and the tug has the right to assume that the ship is sufficiently staunch and equipped for the voyage proposed. Thus in the case of the *Syracuse*, 18 Fed. 828, it was said that:

Justice requires that the continued running of old boats should be closely scrutinized and their owners should not be suffered to conceal their infirm condition, and, when accidents happen, get them repaired or recover as for a total loss, at the expense of others. The owner is bound to give notice of any infirmity about his boat. If she be not staunch and strong; and where this is not done he must be held jointly or solely responsible for such injuries as the present; according to the other circumstances of the case.

The tow must not be overloaded or improperly steered. The obligations of the contract are largely mutual and correlative for generally the tow is largely under the control of her own company and the tug is furnishing motive power and guidance only. Each party to the contract is bound to do its part towards completing it and each vessel involved must use proper skill and diligence in performing its part. The tow is not insured against damage because the tug has taken it in charge. It must not create unnecessary risk, or increase any perils by neglect or mismanagement. The obligations of good seamanship remain on the tow and it is bound to be vigilant and prompt in meeting them. In illustration of these principles one or two cases may be noticed: In the *Marie Palmer*, 191 Fed. 79, the four-masted schooner *Marie*

Palmer, bound from a northern port to Savannah with cargo, encountered heavy weather off Cape Hatteras and put into a North Carolina port, where it was found by a board of survey that she was leaking but could proceed under tow, and the tug *Edgar F. Coney* was employed to take her to Savannah for an agreed price. The vessels started on a clear day with a light breeze and had proceeded 85 miles when, shortly after dark, the schooner stranded on Fryng Pan Shoals and became a total loss. The schooner, shortly prior to stranding, asked the tug if they were not too far in shore, but was answered in the negative. The navigator mistook the Cape Fear light for a gas buoy shown on the chart, although the two were entirely different in height and character, and were fourteen miles apart. There was a deviation in the tug's compass and the card for its correction was not at hand. The master of the schooner libeled the tug. The Court said:

Now it is true that under a contract of towage, the owner of the vessel towing does not insure against marine perils. It is true, however, that he must obey the law, and, in the protection of the life and property intrusted to his sole control, he must exercise that degree of caution and skill which navigators of prudence usually employ in such service. He is held bound to know the waters, the channels, well-defined currents, and such well-defined shoals as have been for a sufficient length of time marked by the government, and all other dangers known generally to men experienced in navigation; and he is bound to exercise such skill and knowledge for the protection of her tow. . . .

It is true that, under ordinary circumstances, damage to a vessel while being towed raises no presumption of fault on the part of the vessel towing; but, where the evidence preponderates to show such negligence, it may be found to exist, although no presumption is allowed in favor of the tow. It has, however, been held by the Supreme Court of the United States in the *Webb*, 14 Wall. 406, that under certain circumstances, if a ship is towed upon a shoal, that the fact of stranding at such place would, in the absence of explanation "be almost conclusive evidence of unskillfulness or carelessness in the navigation of the tug. The place where the injury occurred would be considered in connection with the injury itself, and together they would very satisfactorily show a breach of the contract, if no excuse were given. At least they would be sufficient to cast upon the claimants of the tug the burden of establishing some excuse for the deviation from the usual and proper course."

In the case now under consideration the compass of the tug was inaccurate. The card showing the deviation was not kept before the helmsman. The course was plainly marked and widely known. The

tug and tow starting early in the morning proceeded, until the stranding, but 85 miles only. Frying Pan Shoals is not less widely known than any other on the coast. The captain of the tug, Myers, laid the course, as he testifies, for the buoy. He might have passed it in safety anywhere within a mile to the landward, and, in a practical sense, anywhere to the seaward. He wrecked his tow $4\frac{1}{2}$ miles to the landward of the buoy, and $13\frac{1}{2}$ miles from the Cape Fear Light, which he may have mistaken for the buoy. There was no sudden exigency to divert the judgment. There was abounding opportunity to take the bearings of the lights, and to make soundings. The stranding itself occurred shortly after dark only, in the evening of a clear day, and shortly after the master of the tug had received from the master of the tow urgent and explicit warning of the danger. If under these conditions, as we find them to exist, there is no liability on the tug, which in obedience to the official finding of the surveyors was voluntarily towing the schooner to her port of destination for the agreed-upon compensation, a case which would warrant a finding of liability for similar service or any default seems wholly inconceivable.

In the case of the tug *Quickstep*, 9 Wall. 665, the owner of the canal boat *Citizen* filed a libel *in rem* against the tug, alleging that the tug attempted to tow too many loaded boats and in consequence of which one of the boats broke loose, and the tug while backing in an attempt to pick her up collided with and sank the *Citizen*.

The inquiry is: Who is to blame for this? Clearly not the *Citizen*, for it does not appear that her conduct in any way contributed to the accident. If the tug, in constructing the tow, used the lines furnished by the different boats, yet as each boat was independent of the other, no responsibility can attach to either for the breaking of the line, which she did not provide, and had nothing to do with making fast. In this case neither the bridle line nor the line that first parted were supplied by the *Citizen*, and she ought not to suffer for their insufficiency. It is well settled that canal-boats and barges in tow are considered as being under the control of the tug, and the latter is liable for this collision, unless she can show it was not occasioned by her fault.

It was the duty of the tug, as the captains of the canal-boats had no voice in making up the tow, to see that it was properly constructed, and that the lines were sufficient and securely fastened. This was an equal duty, whether she furnished the lines to the boats, or the boats to her. In the nature of the employment, her officers could tell better than the men on the boats what sort of a line was required to secure the boats together, and to keep them in their positions. If she failed in this duty she was guilty of a maritime fault. The parting of the

line connecting the boat in the rear on the port side with the fleet, was the commencement of the difficulty that led to this accident. In the effort to recover this boat, the consequences followed which produced the collision. If it was good seamanship on the part of the captain of the tug to back in such an emergency, he was required, before undertaking it, at least to know that his bridle line would hold. And if the sea was in the condition the captain of the tug says it was, it was bad management to back at all. Whether this be so or not, he was bound, in executing a maneuver to recover the detached boat, to look to it that no other boat in the fleet suffered in consequence of it.

A tug is not required to subject herself to damage in order to protect her tow. An illustration of this is found in the case of the *Mosher*, 17 Fed. Cas. No. 9874, from which the following is quoted:

The schooner *Nicaragua*, owned by libellants, on the 6th of August having encountered a heavy wind and high sea, which continued during the day, came to anchor, and shortly after, the tug *Mosher* took her in tow. The schooner furnished the tow line. The first broke; a second bore the strain. The vessel in the act of being towed into the harbor was stranded and ultimately lost. Is the tug responsible for this loss?

It is charged that the accident happened through the negligence and want of care of the officers of the tug, and that, at any rate, the disaster would not have been so ruinous, if these officers had used proper efforts to relieve the *Nicaragua*. The first question is, what degree of diligence and skill was required of the tug? The rule is well settled that reasonable diligence and ordinary skill is the measure of the tug's duty. The tug did not engage to insure the safety of the tow, nor for the use of the highest nautical skill. I think Judge Drummond stated the rule fairly, that the tug is bound to know the ordinary and proper channel into the harbor and to exercise reasonable skill under the circumstances, in towing the vessel.

Like the district judge, I do not wish to relax the need of caution of tugs in towing vessels nor establish harsh rules to make them insurers of property.

In what respect did the *Mosher* show less diligence and skill than required? The schooner having taken the chances of entering the harbor in a storm, the tug is not to be held responsible, in the absence of proof of negligence, if the schooner touched some ridge of sand. It is urged that she went aground on the old sand-bar. Although satisfied that she was ultimately wrecked there, I am not satisfied she first struck there. The winds and waves drove her south, and the probability is that her first position was changed.

But the tug is blamed for not using more effort than she did to get the schooner off the bar; in other words, is charged with fault in abandoning the schooner too soon. It is hard to get at the truth for the witnesses on each vessel differ materially in their account of what occurred. At the argument it did seem to me that the tug left the schooner to her fate sooner than she ought to have done, but since reading the testimony, I cannot say that she did not employ all the means practicable and consistent with her own safety. The captain of the tug was not obliged to stay by the schooner if in good faith he believed he would endanger his own vessel. On both points he is supported by the testimony. I think the decree dismissing the libel should be affirmed.

5. Duty of Tow.—The vessels in tow must be properly manned and equipped and carefully follow the tug. They must be vigilant to observe all orders and signals. They must be ready, in case of emergencies, to cast loose from the tug and each other, if thereby collision or stranding may be avoided.

In the *Marie Palmer*, 191 Fed. 79, above cited, the tug defended the suit brought by the schooner on the ground that the schooner was unseaworthy when taken in tow. The unseaworthy condition of a tow is a good defense to such a suit if that fact be concealed from the tug, but not where the condition of the tow is known to the tug.

Equally ineffective is the plea that the master of the tug did not know the extremities to which the schooner had been reduced before he undertook the towage service. The *Palmer* was found storm bound, at anchor, in Lookout Bight. Had she been entirely seaworthy under her sail power, the contract to tow her would have been superfluous. These facts were known to the master of the tug. But, if this were not sufficient, that officer must have taken notice of the vital fact that her storm tossed condition had been passed upon by an official board of survey, and that body, after careful examination, had found that she might proceed with her voyage under tow. It was optional with the captain of the tow boat to accept that finding, and take the tow. Certainly it put him upon notice of inquiry, and he did not hesitate to take the tow as in the condition in which the board of survey found her.

6. Negligence.—The tug is liable for negligence only, apart from the terms of any special contract, and then only for such negligence as is the proximate cause of the loss. Negligence is the failure to observe the rules of navigation or to employ the requisite degree of care and skill of competent mariners in like situations. The burden of proving negligence usually rests upon

the party charging it but towage sufficiently resembles the contract of carriage as frequently to present cases in which the mere happening of an accident to the tow creates a presumption of negligence on the part of the tug. Thus the pleadings themselves may require the tug to explain the disaster and prove that she was not at fault. This presumption has been applied where the tow is stranded off its proper course in calm weather; or where the tug has grounded the tow while proceeding through a fog at full speed without soundings; or where the tow has been brought into collision with an anchored vessel; or where the accident occurs in a customary channel; or where the tug's steering gear and equipment prove insufficient; or where the tow strikes a known obstruction to navigation.

The case of the *Marie Palmer*, heretofore cited, is an example of negligence on the part of the tug.

Where, from the negligent operation of a tug, damage is inflicted by a tow, although the tug herself does no damage, a maritime lien for tort arises against the tug and not against the tow. In the *Clara Clarita*, 23 Wall. 1, the tug engaged and undertook to tow a burning vessel from her berth to a point where it was intended to beach her. While in tow the flames burst through the deck of the burning vessel and severed the hawser by which she was attached to the tug, causing her to drift upon and set fire to the libellant's schooner. Although the tug was far away when the damage was done, the court held her to be in fault because under the circumstances the burning of the hawser ought to have been foreseen and the owners of the damaged schooner were held to be entitled to a maritime lien upon the tug for the damage suffered. It was also held that the tug alone and not the owners of the burned tow should respond in damages. A tug is held not to be the agent of her tow but to occupy the position of an independent contractor. The Court said:

By employing a tug to transport their vessel from one place to another the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the services, as they neither appoint the master of the tug nor employ the crew, nor can they displace either one or the other. Their contract for the service, even though it was negotiated with the master of the tug, is, in legal contemplation, made with the owners of the vessel employed; and the master of the tug continues to be the agent of the owners of his own vessel, and they are responsible for his acts in her navigation and management.

On the other hand cases may arise in which the tow alone and not the tug is liable for injury to a third vessel or person. Thus in *Albina Ferry Co. v. Imperial and S. G. Reed*, 38 Fed. 614, the tug *S. G. Reed* had in tow the ship *Imperial*. The ferry boat *Veto No. 2* was operated on a wire cable. The *Imperial* struck the cable, causing the ferry boat to sustain some damage. The tug was employed by the pilot of the *Imperial* for the purpose of towing the vessel and at the time of the collision was in the control and service of the ship. There was no evidence of any fault on the part of the tug or of any one employed on her. The Court said:

Under these circumstances the steamboat (i.e., tug) and the ship constitute but one vessel and that vessel was the ship. The tug was the mere servant of the tow, and both were under the control and direction of the pilot in charge of the latter. Admitting for a moment that a wrong has been committed, the owners of the *Imperial*, through their agent, the pilot in charge, are the wrongdoers, and their vessel is alone liable therefor. The owner of the *Reed* did not participate in the supposed wrong, neither by itself nor by its servants. As well say that the wrong of a person who recklessly rides another down in a public thoroughfare is the wrong of the liveryman from whom he hired the horse.

It is not denied that there may be and have been cases in which both tug and tow are liable for the damage sustained by a collision. But in such case both participate in the management of the vessel, and the negligence of misconduct causing the same.

A case in which both tug and tow were held liable is that of the *Civilta* and the steam tug *Restless*, 13 Otto 699. In this case the tow had on board a pilot and the tug was subject to his orders. The libellant's schooner was struck by the hawser, then by the tow. The court said that the tow and tug were, in law, one vessel, and the question was, which one? It was held:

The tug furnished the motive power for herself and the ship. Both vessels were under the general orders of the pilot on the ship, but it is expressly found as a fact that the tug actually received no orders from him. Being on the ship, which was two hundred seventy feet astern of the tug, it is not to be presumed that he was to do more than direct the general course to be taken by the ship in getting to her place of destination. The details of the immediate navigation of the tug, with reference to approaching vessels, must necessarily have been left to a great extent to those on board of her. She was where she would ordinarily see an object ahead before those on the ship could, and having all the motive power of the combined vessels

under her own control, she was in a situation to act promptly and do what was required under the circumstances.

We do not entertain a doubt that, situated as the tug was, in the night, so far away from the ship, it was her duty to do what was required by the law of a vessel under steam, to keep herself and the ship out of the way of an approaching vessel, particularly if the pilot of the ship did not assume actual control for the time being of the navigation of the two vessels.

Such being the case, we think it clear both vessels were in fault.

A decree was accordingly given against both the ship and the tug and the damage apportioned one-half to each with the provision that if either of the vessels should prove insufficient to pay its share the residue might be collected from the other.

7. Liability for Damage.—A. *As Between Tug and Tow.*—If the wrongful act or breach of contract of either tug or tow occasions damage to the other, liability will follow and usually a maritime lien. The owners of the tug have a lien upon the tow for the price of the towage and the owners of the tow and its cargo have a lien upon the tug for failure to perform the contract or damages sustained through negligence.

An example is found in the *Cayuga*, 16 Wall. 177. There the tug *Cayuga* undertook a tow of thirty canal boats and barges from Albany to New York. The tow was faultily made up by the tug, libellant's canal boat being upwards of 1,000 feet astern of her. By reason of this faulty make-up and of the method of navigation adopted by the tug, libellant's canal boat was twice brought into collision with obstacles in the river, the first time with a light-house and the second with a submerged rock. The result of the second collision was the loss of the boat. The tug defended on the ground that the canal boat was unseaworthy and that her captain was negligent in cutting her loose from the tow immediately after the second collision.

Even where a contract of towage specifically provides that the tow is being conveyed at her own risk, the tug will be liable in admiralty if through the tug's negligence the tow is injured. The contract will not avail as a defense against negligence (*The Syracuse*, 12 Wall. 167).

In the case of the *Wm. H. Webb*, 14 Wall. 406, the owner of the steamship *Shooting Star* brought a libel *in rem* against the tug *Wm. H. Webb* for breach of contract to tow the *Shooting Star*

from Portsmouth to New York, charging negligence and mismanagement in the towage, whereby the tow was grounded on Tucker-nuck Shoal, which was more than three miles out of the proper course. The court held that the tug was negligent and, therefore, liable. Mr. Justice Strong said:

It must be conceded that an engagement to tow does not impose either an obligation to insure, or the liability of common carriers. The burden is always upon him who alleges the breach of such a contract to show either that there has been no attempt at performance, or that there has been negligence or unskillfulness to his injury in the performance. Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services.

The action for negligent performance of the towage contract may be either against the tug or its owner by the owners or underwriters of the injured property. The damages are those which naturally follow the breach; if the tow and cargo are totally lost, the market value, at the time and place of the loss, with interest, will be allowed as in cases of loss by collision; if the loss is partial then the expenses of repairs, with compensation for loss of use, or demurrage for the time which the work of rescue and repair occupies. Where the tow is old and unseaworthy, the admiralty sometimes apportions the damages. Where both tug and tow are at fault the damages will be divided between them according to the usual admiralty rule¹ (see the *Civilta* and the *Restless*, 13 Otto 699, *supra*).

B. To Third Parties.—Where a third party is damaged through the fault of a tug or the vessel which she has in tow, the party damaged has a right of action against the author of the injury. It is often said that the tug and her tow constitute a single entity. This is true to the extent that where through the negligent operation of the tug damage is done to a third party by one of the vessels in tow, the responsibility rests upon the tug, but responsibility in such cases will not ordinarily attach to the vessel in tow. The tow may be liable in such a case, on the theory that the tug is her agent, but if the tug occupies the status of an independent contractor no liability rests upon the tow. We have seen in the *Clara*

¹ See § 9, Chapter XI, *supra*.

Clarita, 23 Wall. 1, cited in § 5, *supra*, a case in which a tug was held liable for damage by the tow and in which the tow was held to be free from liability because the tug was not her agent. In the case of Liverpool &c. Navigation Co. v. Brooklyn Eastern Dist. Terminal, decided December 8, 1919 (U. S. Supreme Court Advance Sheets, 85), a car float was lashed to the side of the steam tug *Intrepid*, and through the negligent operation of the tug the float was driven into collision with the S. S. *Vauban*, the tug, herself, not coming into collision. It happened that the car float and tug belonged to the same owner. It was held that the responsibility was that of the tug alone; that she might limit her liability to her own value; that the float belonged to the same owner made no difference, and the float accordingly escaped liability. Mr. Justice Holmes said:

The car float was the vessel that came into contact with the *Vauban*, but as it was a passive instrument in the hands of the *Intrepid*, that fact does not affect the question of responsibility (citing numerous cases).

These cases show that for the purposes of liability the passive instrument of the harm does not become one with the actively responsible vessel by being attached to it. If this were a proceeding *in rem* it may be assumed that the car float and disabled tug would escape, and none the less that they were lashed to the *Intrepid*, and so were more helplessly under its control than in the ordinary case of a tow.

It is said, however, that when you come to limiting liability, the foregoing authorities are not controlling,—that the object of the statute is “to limit the liability of vessel owners to their interest in the *adventure*,” and that the same reason that requires the surrender of boats and apparel requires the surrender of the other instrumentalities by means of which the tug was rendering the services for which it was paid. It can make no difference, it is argued, whether the cargo is carried in the hold of the tug or is towed in another vessel. But that is the question, and it is not answered by putting it. The respondent answers the argument with the suggestion that, if sound, it applies a different rule in actions *in personam* from that which, as we have said, governs suits *in rem*. Without dwelling upon that, we are of opinion that the statute does not warrant the distinction for which the petitioner contends.

In the case of *Sturgis v. Boyer*, 24 How. 110, the ship *Wisconsin*, which was being towed by the tug *Hector*, collided with the lighter *Republic* in New York harbor. The owners of the lighter libeled both the tug and the tow. The owner of the tug filed an answer, setting up that the tug was merely the motive-

power to move the ship to the pier, that the tug and her crew were subject to and obeyed the orders of the master and other officers in charge of the ship, and prayed that in case the libellants should recover any sum against the ship and tug, that he, the owner of the tug, might have decree over against the ship. The owners of the ship admitted that she had a master and a full crew on board, but alleged that they were all under the direction and control of the master and officers of the tug. The Court was clearly of opinion that a case of negligence was made out by the owners of the lighter, and the only question in doubt was as to the relative responsibility of the tug and vessel in tow.

Cases arise, undoubtedly, when both the tow and the tug are jointly liable for the consequences of a collision; as when those in charge of the respective vessels jointly participate in their control and management, and the master or crew of both vessels are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation. Other cases may well be imagined when the tow alone would be responsible; as when the tug is employed by the master or owners of the tow as the mere motive power to propel their vessels from one point to another, and both vessels are exclusively under the control, direction and management of the master and crew of the tow. Fault in that state of the case cannot be imputed to the tug, provided she was properly equipped and seaworthy for the business in which she was engaged; and if she was the property of third persons, her owners cannot be held responsible for the want of skill, negligence or mismanagement of the master and crew of the other vessel, for the reason that they are not the agents of the owners of the tug, and her owners in the case supposed do not sustain towards those entrusted with the navigation of the vessel the relation of the principal. But whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels; and third persons suffering damage through the fault of those in charge of the vessels must, under such circumstances, look to the tug, her master or owners, for the recompense which they are entitled to claim for any injuries that vessels or cargo may receive by such means. Assuming that the tug is a suitable vessel, properly manned and equipped for the undertaking, so that no degree of negligence can attach to the owners of the tow, on the ground that the motive power employed by them was in an unseaworthy condition, and the tow, under the circumstances supposed, is no more responsible for the consequences of a collision than

so much freight; and it is not perceived that it can make any difference in that behalf, that a part, or even the whole of the officers and crew of the tow are on board, provided it clearly appears that the tug was a seaworthy vessel, properly manned and equipped for the enterprise, and from the nature of the undertaking, and the usual course of conducting it, the master and crew of the tow were not expected to participate in the navigation of the vessel, and were not guilty of any negligence or omission of duty by refraining from such participation.

Unless the owner and the person or persons in charge of the vessel in some way sustain towards each other the relation of principal and agent, the injured party cannot have his remedy against the colliding vessel. By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service. They neither appoint the master of the tug, or ship the crew; nor can they displace either one or the other. Their contract for the service, even though it was negotiated with the master, is, in legal contemplation, made with the owners of the vessel, and the master of the tug, notwithstanding the contract was negotiated with him, continues to be the agent of the owners of his own vessel, and they are responsible for his acts in her navigation.

Whether the party charged ought to be held liable, is made to depend, in all cases of this description, upon his relation to the wrongdoer. If the wrongful act was done by himself, or was occasioned by his negligence, of course he is liable, and he is equally so, if it was done by one towards whom he bore relation of principal; but liability ceases where the relation itself entirely ceases to exist, unless the wrongful act was performed or occasioned by the party charged.

Applying these principles to the present case, it is obvious what the result must be. Without repeating the testimony, it will be sufficient to say, that it clearly appears in this case that those in charge of the steam tug had the exclusive control, direction and management of both vessels, and there is not a word of proof in the record, either that the tug was not a suitable vessel to perform the service for which she was employed, or that any one belonging to the ship either participated in the navigation, or was guilty of any degree of negligence whatever in the premises.

8. Pilots.—There are port and sea pilots, the latter being a name for those of her officers who navigate the ship at sea and the former meaning those who take the ship in and out of harbor. Port or coast pilots are a class by themselves, exercising an office of great importance, and usually regulated by law. This is the

class referred to in U. S. Comp. St. 1916, § 7981, where it is enacted that "until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively enact for the purpose." The former class, or sea pilots, are dealt with by Congress in §§ 8204, 8205, 8206, 8207, 8208, etc., of the same volume. The several states may, therefore, regulate and license port pilots, that is, the class whose employment is to guide vessels in and out of their respective ports. They may make it a criminal offense for a pilot not duly qualified under their laws to take a vessel through their waters and make all requisite provisions in regard to qualifications, fees and licenses, so long as Congress refrains from further legislation on the subject. Most of the States on the seaboard have such statutes, different somewhat in detail but generally similar in effect. Ships are not absolutely bound to accept the services of such pilots but must pay their fees, in whole or in part, if services are tendered and declined.

9. **Duties.**— The pilot is the servant of the owner, if voluntarily employed, otherwise not. Like other persons, he is answerable for any damage he may cause by negligence or default. Occupying a quasi-public position and the ship not being free to decline his services, it is his duty to render his services, when requested, to the best of his ability. If he refuses, he may be liable both civilly and criminally. The ancient sea-laws were stringent in this regard; the Laws of Oléron, for example, provide that if disaster is sustained by the ignorance of the pilot, he shall be obliged to make full satisfaction therefor, and, if he has not wherewith to make satisfaction, the master, or any one of the mariners or merchants may cut off his head and shall not be bound to answer for it. When a pilot takes charge of a vessel at sea, it is his duty to stay by her, unless discharged, until she reaches her destination or some place of safety. He is held to be able to anticipate the action of the wind and sea on boats in his charge. He must be thoroughly familiar with the topography and character of the waters for which he offers his services, and keep acquainted with all changes therein, both as to fixed and temporary landmarks and also as to the character of the bottom and presence of temporary obstructions therein.

10. Authority.— While a pilot is on board he has absolute and exclusive authority in the absence of the master, and, probably, ranks the master when he is present. The authorities are not plain or satisfactory on this point, but there ought not to be any divided authority, particularly in such navigation as that for which the law requires the employment of a pilot. Unless the master retains, or reassumes, charge of the ship, the pilot has exclusive control and all are bound to obey his orders; he is an officer of the ship within the meaning of the statutes in regard to revolts and mutinies. But the master's authority is not annulled and it would be his duty to interfere in case of gross ignorance or palpable mistake on the part of the pilot.

Thus, in the case of the *China*, 7 Wall. 53, where the pilot was employed under a compulsory pilot law, the Court said:

It is the duty of the master to interfere in cases of the pilot's intoxication or manifest incapacity, in cases of danger which he does not foresee, and in all cases of great necessity. The master has the same power to displace the pilot that he has to remove any subordinate officer of the vessel. He may exercise it or not, according to his discretion.

In *Ralli v. Troop*, 157 U. S. 386, Justice Gray said:

To the pilot, therefore, temporarily belongs the whole conduct of the navigation of the ship, including the duty of determining her course and speed, and the time, place and manner of anchoring her. But the master still has the duty of seeing to the safety of the ship, and to the proper stowage of the cargo. For instance, the duty to keep a good lookout rests upon the master and crew. And it has been held by Dr. Lushington, in the English High Court of Admiralty, that, although a pilot is in charge, the trim of the ship is within the province of the master; as well as the duty, if two vessels entangled together, to cut away part of the rigging of his vessel, when necessary, in order to avoid a collision, or to lessen its effect, because the vessel, the judge said, "was not under orders of the pilot for this purpose; she was only under the pilot's directions for the purpose of navigation; and the master, in a case of this description, is not to wait for the pilot's directions, which would tend to create great confusion and delay."

11. Compensation.— Compensation of pilots is largely regulated by local statutes and where their employment is compulsory, an offer of service, if declined, will nevertheless create a liability for full or partial fees against the vessel. If no fees are fixed by local law, the amount will be measured by what is customary

or fair and reasonable. By the general maritime law, the pilot has a lien upon the ship for services rendered which is of high rank and priority (but is junior to a "preferred mortgage given on an American ship pursuant to the Merchant Marine Act of 1920, see Appendix). By acting as master, he may waive his lien as pilot in those cases where there is no lien for a master's services; and, correspondingly, one who is engaged and ships as a pilot of a vessel, whereon another stands as registered master, has a lien on the boat for his wages although he may be in entire charge of her navigation.

12. **Negligence.**—The pilot is considered as the master for the time being and is answerable for any loss or injury caused by his want of skill. Such negligence may consist in lack of knowledge of the locality or failure to handle the ship with ordinary care. In general he must exercise the ordinary care and skill of his profession and failure so to do will render him liable for negligence. Harbor pilots, for example, are selected for their personal knowledge of the topography through which they take the ship and are deemed to know all its landmarks, channels, courses, constructions and local regulations. All these they must know and remember and observe. They must be expert in their business and each must furnish the same degree of care and skill commonly possessed by others in the same vocation. Thus pilots have been held liable for running a vessel against a pier freshly built into the channel; for failing to appreciate the significance of fixed lights; for towing in a gale; for hugging the shore on a dark night; they are answerable for the safety of the property in their charge and, in the event of damage or loss, will be released from liability only by showing that the causes were beyond their control, as by proving due care and skill or that the cause was an act of God or unavoidable emergency. Where a vessel in his charge is brought into collision and pays, either under a decree or through a reasonable settlement, the damages arising therefrom, the pilot may be held liable over to her owners for what they have been so compelled to pay. But members of pilots' associations are not jointly liable for the negligence of their members even if their earnings go into a common fund.

A case illustrative of the duties and responsibilities of a pilot is that of *Wilson v. Charleston Pilots' Association*, 57 Fed. 227. The master of the schooner *Kate Aitken*, which was in Charleston

harbor and was about to go to sea in tow of the tug *Relief*, applied to the Association for a pilot, and Mr. Bringloe was assigned to him. When the pilot boarded the schooner he asked the master whether he preferred the pilot to be on the tug or on the schooner. It was the custom to put the pilot on the tug, unless the master wished otherwise. The master expressed his preference that the pilot should be on the tug. The Court remarked in passing "that if disaster occur because the pilot is on the wrong boat he cannot excuse himself by reason of any preference of the master. He is employed because of his supposed knowledge of all that is necessary to take a vessel to sea." The pilot took his place on the tug and gave direction with regard to the position of the hawser. He took his position on the top of the house and constantly directed the movements of both tug and schooner. Nevertheless the schooner went aground. The Court said:

Is the pilot responsible in damages for this accident? He was in control of the movements of the tug and of the tow. He was charged with the safety of the schooner, and of all that she carried, being bound to use due diligence and care and reasonable skill in the exercise of his important functions. He is answerable if the schooner suffered damage through his default, negligence, or want of skill, while her helm was under his control. He was not an insurer, and is only chargeable for negligence if he fail in due knowledge, care, or skill in avoiding obstructions known or which should have been known to him. If he used his best judgment and skill in avoiding known dangers, he cannot be held liable, although the result may show that his judgment was wrong. "It is settled that if the occupation be one requiring skill, the failure to exert that needful skill, either because it is not possessed or from inattention, is gross negligence." Curtis, J., in the *New World v. King*, 16 How. (U. S.) 469. An eminent text writer, whose name is authority, lays down the principle:

"Every man who offers his services to another, and is employed, assumes to exercise in the employment such skill as he possesses with a reasonable degree of diligence. In all these employments where peculiar skill is requisite, if one offer his services, he is understood as holding himself out to the public as possessing the degree of skill commonly possessed by others in the same employment, and if his pretensions are unfounded he commits a species of fraud on every man who employs him in reliance on his public profession. But no man, whether skilled or unskilled, undertakes that the task he assumes shall be performed successfully and without fault or error. He

undertakes for good faith and integrity, but not for infallibility; and he is liable to his employer for negligence, bad faith, or dishonesty, but not for losses consequent on mere error of judgment."

This is the law of this case.

There is a total absence of evidence tending to show want of knowledge, want of care, or want of skill, or bad faith, except the fact of the accident itself. This is not a case in which the fact of the accident is conclusive of the cause. If the grounding arose from the act of the pilot, it was by an error of judgment. The distinction between an error of judgment and negligence is not easily determined. It would seem, however, that if one assuming a responsibility as an expert possesses a knowledge of facts and circumstances connected with the duty he is about to perform, and if he brings to bear all his professional experience and skill, weighs these facts and circumstances, and decides upon a course of action which he faithfully attempts to carry out, the want of success, if due to such course of action, would be attributed to error of judgment, and not to negligence. But if he omits to inform himself as to facts and circumstances, or does not possess the knowledge, experience, or skill which he professes, then, if failure is caused thereby, this would be negligence. But it does not appear that the accident was occasioned by an error of judgment on the part of the pilot.

13. **Liability of the Ship.**—The ship will be liable for damage done while in charge of a pilot unless there is a special exemption by local law.

Where the law requires the ship to take a pilot on board and to surrender the navigation of the ship to him, the master and owners are exempt from responsibility for damages resulting from the mismanagement of the pilot. The reason is this: The laws which establish such compulsory pilotage are intended to secure, as far as possible, protection to life and property, by supplying a class of men better qualified than ordinary mariners to take charge of ships where navigation is attended with unusual difficulty on account of local conditions; the master, however well qualified, is compelled under penalty to abdicate his authority in favor of the pilot, and, if so, it is unjust that either he, or the owner, should be personally answerable for the errors of an official in whose selection he had no choice. The responsibility of an owner for the acts of his servant rests upon the presumption that the owner chooses the servant and gives him orders which he is bound to obey and that responsibility ceases when the law supplants the owner's choice. Therefore neither the master nor the owner can be suc-

cessfully sued at common law, or personally in the admiralty, for damage done by a compulsory pilot. This was held on a full consideration of the American and English authorities by Justice Gray in *Transportation Co. v. La Compagnie Générale Transatlantique*, 182 U. S. 406, which is very instructive in this connection.

The ship, however, is liable for such damage, although in charge of a compulsory pilot. The reason is this: By American admiralty law, the ship is treated as a personality for many purposes and, in whosoever hands she may lawfully be, is treated as the actual wrongdoer, irrespective of any question of agency or employment. Thus, in this country, the ship by whose fault a collision has occurred may be sued directly, although in charge of a compulsory pilot at the time the disaster occurred. In England the rule is different and the ship is not liable if the owner could not be sued. The leading American case on this point is that of the *China*, 7 Wall. 53. The *China*, while under the control of a compulsory pilot, was in collision with the brig *Kentucky*, which was wholly free from blame. On a review of the English and American authorities the Court (Swayne, J.) held:

The services of the pilot are as much for the benefit of the vessel and cargo as those of the captain and crew. His compensation comes from the same source as theirs. Like them he serves the owner and is paid by the owner. If there be any default on his part, the owner has the same remedies against him as against other delinquents on board. The difference between his relations and those of the master is one rather of form than substance.

The maxim of the civil law — *sic utere tuo ut alienum non laedas* — may, however, be fitly applied in such cases as the one before us. The remedy of the damaged vessel, if confined to the culpable pilot, would frequently be a mere delusion. He would often be unable to respond by payment — especially if the amount recovered were large. Thus, where the injury was the greatest there would be the greatest danger of a failure of justice. According to the admiralty law, the collision impresses upon the wrong-doing vessel a maritime lien. This the vessel carries with it into whosoever hands it may come. It is inchoate at the moment of the wrong and must be perfected by subsequent proceedings. Unlike a common law lien, possession is not necessary to its validity. It is rather in the nature of the hypothecation of the civil law. It is not indelible, but may be lost by laches or other circumstances.

The proposition of the appellants would blot out this important feature of the maritime code, and greatly impair the efficacy of the system. The appellees are seeking the fruit of their lien. All port regulations are compulsory. The provisions of the statute of New York are a part of a series within that category. A damaging vessel is no more excused because she was compelled to obey one than another. The only question in all such cases is, was she in fault? The appellants were bound to know the law. They cannot plead ignorance. The law of the place makes them liable. This ship was brought voluntarily within the sphere of its operation, and they cannot complain because it throws the loss upon them rather than upon the owners of the innocent vessel. We think the rule which works this result is a wise and salutary one, and we feel no disposition to disturb it.

REFERENCES FOR GENERAL READING

- Admiralty*, Hughes, 117-124; 28-38.
Admiralty Reports, Brown, Williams, 208.
Sturgis v. Boyer, 24 How. 110.
Collisions, Marsden, Chapter VIII.
Webb, 14 Wall. 406.

CHAPTER XIII

SALVAGE AND GENERAL AVERAGE

1. **Definitions.**— Salvage may be defined as a legal liability which is created by the rescue of maritime property from perils of the sea. It may be quite independent of contract or agreement and these do not affect its nature. The word also designates the reward or compensation for the rescue and, sometimes, the property which is saved. Its essentials are maritime property in peril and a voluntary successful effort to save it. From the standpoint of the owner of the property, it is the price of safety.

The ingredients of a salvage service are, first, enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow-creatures, and to rescue the property of their fellow-subjects; secondly, the degree of danger and distress from which the property is rescued — whether it were in imminent peril, and almost certain to be lost if not at the time rescued and preserved; thirdly, the degree of labor and skill which the salvors incur and display, and the time occupied. Lastly, the value. Where all these circumstances concur, a large and liberal reward ought to be given; but where none, or scarcely any take place, the compensation can hardly be denominated a salvage compensation: it is little more than a remuneration *pro opere et labore* (The Clifton, 3 Hagg. Adm. 14, 48 [*quoted with approval in Cope v. Drydock Co.*, 119 U. S. 625]).

General Average is also the price of safety under different circumstances. It is the contribution required of the parties interested in a maritime venture to compensate the sacrifice of a part for the safety of the rest. The typical instance is the jettison of cargo in order that the ship may be saved; the loss is equalized by a general average.

2. **What May Be Salvaged.**— The subject of salvage can only be vessels and property that is or has been on board a vessel. In Chapter I, § 4, there is some discussion of what constitutes a ship within the meaning of the law. In *Cope v. Drydock Co.*, 119 U. S. 625, salvage was claimed rescuing a floating drydock, which had been in collision with a steamship and was on the point of

sinking. The Court held that the service performed was not salvage because the drydock was not a vessel and not a salvable thing. Justice Bradley said that a dock, though floating, was not used for the purpose of navigation and that "no structure that is not a ship or vessel is a subject of salvage," adding:

A ship or vessel, used for navigation and commerce, though lying at a wharf, and temporarily made fast thereto, as well as her furniture and cargo, are maritime subjects, and are capable of receiving salvage service.

If we search through all the books, from the Rules of Oléron to the present time, we shall find that salvage is only spoken of in relation to ships and vessels and their cargoes, or those things which have been committed to, or lost in, the sea or its branches, or other public navigable waters, and have been found and rescued.

There has been some conflict of decision with respect to claims for salvage service in rescuing goods lost at sea and found floating on the surface or cast upon the shore. When they have belonged to a ship or vessel as part of its furniture or cargo they clearly come under the head of wreck, flotsam, jetsam, ligan, or derelict, and salvage may be claimed upon them. But when they have no connection with a ship or vessel some authorities are against the claim, and others are in favor of it.

It was held by the Supreme Court of the United States (*The Jefferson*, 215 U. S. 130) that where a vessel, laid up in drydock in a shipyard for repairs, was saved from destruction by a fire, which was raging in the shipyard, by tug boats in the stream which played streams of water from the stream upon the endangered vessel, it was a case of salvage. The Court after remarking that a maritime lien for repairs existed against a vessel in drydock, said:

There is no distinction between the continued control of admiralty over a vessel when she is in a drydock for the purpose of being repaired, and the subjection of the vessel when in a drydock for repairs to the jurisdiction of a court of admiralty for the purpose of passing upon claims for salvage services, by which it is asserted the vessel, while in the dock, was saved from destruction.

3. Salvor's Lien.—Whoever performs a salvage service acquires a maritime lien of the highest rank upon the property saved for this compensation. This lien is quite independent of possession and will be enforced by a court of admiralty by a proceeding

in rem, i.e., against the ship. Ordinarily it is the salvor's duty promptly to place the property in possession of the court by libeling it for salvage at his first opportunity for such an award as the court shall deem just. This will usually be his only remedy, in the absence of an express contract. There is no personal liability against the owner of the property saved unless he requested performance of the service or received the property with knowledge of the claim.

4. **Amount of Reward.**—The amount of salvage is usually regulated by the value of the property saved and the value of that engaged in the operation; the degree of risk or peril and the time and expense of the salvors. The expenses of volunteer salvors cannot be recovered as such, though the court may take them into consideration in fixing the amount of the award.¹ Success is essential. There can be no salvage award for the most meritorious efforts if unsuccessful. It is the policy of the admiralty to stimulate efforts for the rescue of property in distress by liberal rewards and also to discourage exorbitant demands and inequitable behavior by correspondingly reducing them. In the case of the *Sandringham*, 10 Fed. 556, the court listed the factors involved in determining the amount to be awarded as salvage as follows:

- (1) The degree of danger from which the lives or property are rescued.
- (2) The value of the property saved.
- (3) The risk incurred by the salvors.
- (4) The value of the property employed by the salvors in the wrecking enterprise, and the danger to which it was exposed.
- (5) The skill shown in rendering the service.
- (6) The time and labor occupied.
- (7) The degree of success achieved, and the proportions of value lost and saved.

Work of this nature is often performed by contract, by vessels and corporations equipped and organized for the purpose. This fact does not militate against their claims as salvors in proper cases but the courts will not hesitate to modify the contract if they consider it unjust. The case of the *Leamington*, 86 Fed. 675,

¹ *Teutonia v. Erlanger*, 248 U. S. 521.

contains a note giving many instances of amounts awarded under various circumstances.²

As a general thing salvage is not allowed in an amount exceeding 50 per cent of the value of the thing salvaged, although there are cases where as high as 75 per cent has been allowed. There was an old rule, "50 per cent for a derelict." This rule has been departed from in many cases. The amount to be awarded lies largely in the sound discretion of the trial court which takes into consideration all of the elements of labor, risk, value, time, expense, and any other features that may enter into the case. It is practically impossible to lay down rules for determining the amount to be awarded. The books, however, say that the award should not be so great that the salvage service becomes of no use to the owner of the thing salvaged. For example if the charges and expenses of the owner come to 50 per cent of the value of the thing salvaged, an award of 50 per cent will not be made to the salvors, no matter how perilous, arduous and meritorious their work may have been to the owners. Sometimes the award when computed on percentage of the value of the salvaged property is very small, in some cases only about 4 per cent. These are cases where the service performed was not extensive or highly meritorious and the salvage property was of large value, so that the amount of money received by the salvors was considerable, though the percentage was small. The amount awarded to salvors is not always calculated on the basis of a percentage or proportion of the value salvaged; in many cases the trial court fixes a flat figure which it thinks the service worth.

5. Who May Be Salvors.—Generally, any one not under obligation to render the service, may rank as a salvor, and, conversely, those obliged to work, cannot claim any reward. Sailors on the ship in peril cannot be salvors until released from their engagement or an abandonment of the ship. A passenger cannot earn salvage by mere labor on a vessel in peril, for this is his duty, yet for extraordinary services he may have a salvage award. Such was the case of the *Great Eastern* when she had been disabled by a gale and was lying helpless in the trough of the sea. Among the passengers was a civil engineer who ingeniously devised and after twenty-four hours' labor carried out a plan for

² See § 10, this title, *infra*.

steering her so that she was able to make port. The court awarded him about \$15,000. So, in the *Fair American*, captured by a French privateer and in charge of a prize-crew, her cook succeeded in recapturing and bringing her into port by exertions outside his line of duty, and ranked as a salvor accordingly.

A pilot acting within the line of his duty, however he may entitle himself to extraordinary pilotage compensation as distinct from ordinary pilotage for ordinary services, cannot be entitled to claim salvage, but a pilot is not disabled from becoming a salvor if he performs salvage services outside the scope of his duties. He stands in the same relation to the property as any other salvor (*Hobart et al. v. Drogan*, 10 Peters 108).

6. Distinction Between Towage and Salvage.—Cases have frequently arisen in which a vessel that has towed another into a place of safety has claimed salvage for so doing. Whether or not the service rendered amounts to salvage and entitles the towing vessel to a salvage reward, or is mere towage to be recompensed as such, is sometimes difficult to determine. There is no fixed guide. In the *J. C. Pfluger*, 109 Fed. 93, the Court said:

If the vessel towed was by this means aided in escaping from a present or prospective danger, the service will be regarded as one of salvage, and the towage as merely an incident. If, upon the other hand, the vessel thus assisted was not encompassed by any immediate or probable future peril, such service will be treated as one of towage merely, and compensated as such. It was said by Dr. Lushington (*The Charlotte*, 3 W. Rob. Adm. 68) that, in order to constitute a salvage service, it is "not necessary that the distress should be actual or immediate, or the danger imminent and absolute; it is sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the service were not rendered." In *McConochie v. Kerr* (D. C. 9 Fed. 50), Judge Brown, in pointing out the distinction between a salvage and towage service, said:

"A salvage service is a service which is voluntarily rendered to a vessel needing assistance, and is designed to relieve her from some distress or danger, either present or to be reasonably apprehended. A towage service is one which is rendered for the mere purpose of expediting her voyage, without reference to any circumstances of danger."

In the case of the *Emily B. Souder*, 15 Blatch. 185, Fed. Cas. No. 4,458, Chief Justice Waite stated the law upon this point as follows:

"It is well settled that, if there is not actual or probable danger, and the employment is simply for the purpose of expediting the voyage, such service is towage and not salvage."

Under the plain and well-settled rule declared in the foregoing cases, whether a particular service was one of salvage or towage is always a question of fact to be ascertained from a consideration of the circumstances under which the court shall find the service was rendered; and, unless the evidence shows that the vessel towed was thereby assisted in getting safely away from some actual or apprehended peril, the case is not one in which salvage has been earned.

In the *Reward*, 1 W. Rob. 174, a distinguished English judge laid it down that,

Mere towage service is confined to vessels that have received no injury or damage; and mere towage reward is payable in those cases only where the vessel receiving the service is in the same condition she would ordinarily be in without having encountered any damage or accident.

7. Distribution of Salvage Award.—The rule of the admiralty is that all who materially contribute to the rescue are entitled to share in the award. Thus the master and crew of the salving vessel are entitled to participate with the owner, according to their individual exertions and success. The owner should not appropriate the whole unless the crew were especially employed for the work. The court will frequently divide the amount between the owner and the crew and apportion the share of the latter in proportion to their wages. The principal element in determining the owner's share is the value of the ship and the risk to which it was exposed. Under special circumstances the cargo-owner may also participate.

Where the salving vessel is a steamer the owners' share of the salvage is larger and that of the crew proportionately smaller than if she were a sailing vessel or other craft because of the superior efficiency of a steamer in salvage work. Credit and compensation for the superior character of the salving vessel must go to her owners. In *Transportation Co. v. Pearsall*, 90 Fed. 435, there is a discussion of salvage distribution. In that case three tugs, all belonging to the same owner, had salvaged a steamer which had gone ashore. The owner of the tugs affected a settlement with the owners of the steamer and received \$13,000 in full of all demands. A libel *in personam* against the master and owner of the tugs was brought by the engineer and fireman of the third, each claiming a share of the \$13,000. The court decided that the owner of the tugs was entitled to two-thirds of the salvage award, and ordered the remaining one-third to be distributed among the

masters and crews of the tugs proportionately, awarding the engineer \$500 and the other libellants \$200 apiece, these awards being in proportion to their wages. The court remarked that under the rule once prevailing in admiralty the owners of the salving vessel could not receive more than one-third of the award unless there were unusual circumstances of peril to the salving vessel, that that rule had been modified in the direction of greater liberality to steamships, citing cases in which the share of the salving vessel had been fixed at three-fourths and even four-fifths. The Court said:

An examination of the cases will show that there is no fixed rule with regard to the proportion in the salvage award allotted to the owners of the salving vessel. Most frequently salvage services are rendered upon a voyage, in the absence of the owners, and when the salving vessel is under the charge of, and is controlled by, the master and crew. As salvage is awarded for the encouragement of promptness, energy, efficiency, and heroic endeavor in saving life and property in peril, the claims of the master and crew who exhibited these qualities must meet the most favorable consideration. At the same time an allowance is made for the owners whose property has been imperiled. But when the owners direct the service, or when the peril encountered is chiefly that of the salving vessel, with no proportionate peril to the crew, an award to the owners is more liberal.

It was also said that the making of distribution in proportion to the wages is a "just and uniform rule in all ordinary cases."

Where salvage is performed by successive sets of salvors,—for instance, if one set of salvors gets a ship off a reef, and a second set takes her into port—the award is apportioned between the two sets, special consideration being shown to the first set of salvors because they made the work of the second possible.

8. Distribution of Liability for Payment.—The vessel, cargo, and freight money saved are to contribute to the payment of the salvage award according to their relative values at the port of rescue. As between the ship and cargo, each is liable for its own proportion alone. The salvor cannot recover the entire salvage from either, but only the proportion for which respondent is liable. As was said by Justice Story in *Stratton v. Jarvis*, 8 Peters 4:

It is true that the salvage service was in one sense entire; but it certainly cannot be deemed entire for the purpose of founding a right against all the claimants jointly, so as to make them all jointly

responsible for the whole salvage. On the contrary, each claimant is responsible only for the salvage properly due and chargeable on the gross proceeds or sales of his own property *pro rata*. It would otherwise follow that the property of one claimant might be made chargeable with the payment of the whole salvage, which would be against the clearest principles of law on this subject.

Where a ship is saved and unable to continue her voyage and carry out her contracts of affreightment, the freight is one of the things of value saved, but in determining the value of the freight saved for the purpose of assessing a salvage award against it, "the freight to be considered is only such proportion of the freight earned by the entire voyage as the distance at which the salvage service was rendered from the port of departure bears to the whole voyage." *The Sandringham*, 10 Fed. 556.

9. Statutory Regulations.—By the Act of August 1, 1912, (7 U. S. Comp St. §§ 7990-7994) it is provided that the right to remuneration for salvage services shall not be affected by the fact that the same person owns both vessels; that the master must render assistance to every person found at sea who is in danger of being lost, so far as he can do so without serious danger to his own vessel, under penalty of not exceeding one thousand dollars or imprisonment not exceeding two years, or both; that salvors of human life are entitled to share in the award; that salvage suits must be brought within two years; and that nothing in the Act shall apply to ships of war or Government ships on public duty.

10. Instances of Salvage Services.—Where a fishing schooner on the Atlantic picked up a floating body on which was a wallet containing a considerable sum of money and promptly delivered the treasure to the court, they were awarded one-half the amount, to be apportioned one-third to the owners of the fishing vessel, one-third to the master and one-third to the crew; the master's share was made somewhat larger because he had resisted the proposal of some of the crew to merely divide the coin and say nothing. The balance was turned over to the public administrator of Massachusetts to hold for the benefit of the unknown heirs, and, if they failed to appear, for further disposition according to law (*Gardner v. Gold coins*, 111 Fed. 552). The Egyptian obelisk, now in London and known as "Cleopatra's Needle," became the subject of salvage services in the Bay of Biscay, during its voyage from Alexandria and the award was two thousand

pounds (see *Dixon v. Whitworth*, 4 Asp. M. L. C. 138, 327). In the *Jefferson*, 215 U. S. 130, the vessel was in a drydock and threatened by a conflagration on adjoining property; tugs stood by and played streams from their hose upon her until the danger was past. The court overruled the argument that the service could not be salvage because the vessel was not afloat and directed an award. Where, however, a steamer had been swept high and dry on the shore about a hundred feet above high-water mark and lay there five years, the court declined to consider as salvage the plan and work of floating her by dredging out a basin and canal for her flotation; she had ceased to be engaged in commerce and navigation and the contract was not maritime (*Skinner*, 248 Fed. 818). The doctrine of this case will probably not be extended beyond its own facts. In the *Burlington*, 73 Fed. 258, where the ship had been stranded to put out a fire and lay as a menace to navigation while the owner and underwriters were in dispute as to his right to abandon, and the salvor brought her safely into port, he was awarded the entire value as salvage; while in *Murphy v. Dunham*, 38 Fed. 503, where the salvor proceeded on the erroneous idea that the cargo-owner's title is extinguished when his property sinks, and saved it for his own use, he was only allowed his expenses and narrowly escaped being assessed for the full value. The *Albany*, 44 Fed. 431, is another instance of the persistence of the old notion that title is acquired by finding property lost at sea; the ship had stranded and the master was jettisoning a valuable cargo of package freight; the countryside swarmed with wagons and lighters to appropriate what could be obtained. The Court held the parties as for embezzlement and said there was a medieval flavor about their conduct which recalled to a student of maritime law the customs of the ancient Gauls, who not only appropriated the cargoes of vessels wrecked on their coasts but sold their crews into slavery or sacrificed them to their gods. The Court quoted the following succinct statement of the nature of salvage from Mr. Justice Story:

In cases of salvage, the party finds himself upon a meritorious service, and upon an implied understanding that he brings before the court, for its final award, all the property saved, with entire good faith, and he asks a compensation for the restitution of it uninjured and unembezzled by him. The merit is not in saving the property alone, but it is in saving and restoring it to the owners. However meritorious the act of saving may have been, if the property is subse-

quently lost, and never reaches the owner, no compensation can be claimed or decreed.

11. Distinction Between General and Particular Average.—

The former is a partial loss, voluntarily incurred for common safety, and recompensed by all benefited thereby; the latter is a partial loss involuntarily caused, which must be borne by the party on whom it falls. One of the most approved definitions of general average is,—“All loss which arises in consequence of extraordinary sacrifices made, or expenses, incurred, for the preservation of the ship and cargo, comes within general average, and must be borne proportionately by all who are interested.”

In the case of *Barnard v. Adams*, 10 How. (U. S.) 270, the ingredients of general salvage were thus stated:

In order to constitute a case for general average, three things must concur:

1st. A common danger; a danger in which the ship, cargo and crew all participate; a danger imminent and apparently “inevitable,” except by voluntarily incurring the loss of a portion of the whole to save the remainder.

2nd. There must be a voluntary jettison, *jactus*, or casting away, of some portion of the joint concern for the purpose of avoiding this imminent peril, *periculi imminenti evitandi causa*, or, in other words, a transfer of the peril from the whole to a particular portion of the whole.

3rd. This attempt to avoid the imminent common peril must be successful.

12. Essential Elements.—The rule expresses the plainest principles of common justice but is confined to maritime law and within somewhat precise limitations. The sacrifice for which contribution is sought must be directed by the master of the ship or by his authority;³ it must be voluntary and for the safety of the entire venture⁴ it must be necessary and successful;⁵ and neither

³ The reason is that the master “derives his authority from the implied consent of all concerned in the common adventure” (*The Hornet*, 17 How. 100). “The character of agent respecting the cargo is thrown upon the master by the policy of the law, acting on the necessity of the circumstances in which he is placed” (*The Gratitude*, 3 C. Rob. Adm. 240).

⁴ “Where the sacrifice, while for the general benefit of the whole adventure, was also for the particular benefit of the cargo, it was not a subject of general average” (*The Mary*, 1 Sprague 19).

⁵ Expenses voluntarily and successfully incurred, or the necessary consequences of resolution voluntarily and successfully taken, by a person in charge of a sea adventure, for the safety of life, ship and cargo, under the pressure of a danger of total loss or destruction imminent and common to them, give, the ship being saved, a claim to general average contribution (*Abbott on Shipping*, 537, note).

the party whose fault occasioned the loss nor any outside of the interests represented in the ship and cargo can have contribution.⁶ Thus the scuttling of a ship by order of port authorities to extinguish a fire in the hold is not general average, although it would have been if done by order of the master. If the vessel is stranded by force of wind or current, there is no general average loss, while if the master deliberately puts her ashore, choosing the locality to escape a greater danger, it will be considered a case for general average by American law. Where the master threw overboard a quantity of coin, not to save the ship and cargo, but to prevent the money falling into enemy hands, it was not general average although it would have been if his purpose had been to lighten the ship in order to escape. Where the sacrifice is not necessary, in a pecuniary sense, for the common safety, it is not allowed, as where a vessel met a foundering emigrant ship and threw overboard part of its cargo in order to take the passengers on board; this was not a general average loss entitling the owner of the cargo to contribution. When the sacrifice is unsuccessful there is no general average, as where the master of a ship which was dragging her anchors cut away the masts to prevent the drifting, but she finally went ashore; and where the cause of the sacrifice is a fault of the ship or defect in the cargo, contribution is denied; so also when a tug cuts the towline of her barges in a storm to save herself from going ashore with them and thereby saves herself.

13. Instances of General Average.—The classic example⁷ is throwing overboard (or, as it was called, jettisoning) a part of the cargo in order to escape a storm. Thus if there is a ship worth \$20,000, freight list, \$10,000, and cargo \$70,000, of which X owns \$30,000, Y \$20,000, and Z \$20,000, and \$10,000 of X's goods were jettisoned, each interest, including X, will bear 10 per cent of the sacrifice; the ship pays X \$2,000; the freight list pays him \$1,000; and Y and Z pay him \$2,000 each; he receives \$7,000 and stands \$3,000 and so the sacrifice is equally borne by all. Cargo may be burnt as fuel, or lost by a sale or pledge to

⁶ Thus where a tug abandoned her tow in order to save the tug; the owners of the tow were not entitled to general average contribution because it was not a part of the ship or cargo.

⁷ Probably the earliest recorded case is that mentioned in Jonah 1, where cargo was jettisoned to lighten a ship in peril on a voyage from Joppa to Tarshish. The elements of general average were present, though it does not appear that an adjustment was made.

raise money to continue the voyage; a mast may be cut away to lighten the ship or the engines injured by overwork to escape disaster or expenses incurred by deviating to a port of refuge for repairs; cargo may be warehoused or transshipped; salvage expenses may be incurred in saving the venture from a stranding or sinking after a collision; and all the various and multiform forms of loss sustained and expenses incurred for common safety, within the definition, are made good by the contribution of all.

Ordinarily a jettison of cargo carried on deck does not give rise to general average, although deck cargo is not exempt from contributing its share of the average for other cargo jettisoned for its safety. But deck cargo will be entitled to participate in general average where the goods are of such character as it is customary in the trade to carry on deck; also where the other cargo-owners have expressly consented that it be carried on deck; also usually in coasting and river voyages. The cases excluding deck cargo from average have generally arisen out of sailing vessels and it may be that the rule should be confined to sailing vessels.

14. The Adjustment.—This ascertains the amount of the claim and the respective shares of contribution. It is the duty of the master and shipowner to see that timely steps are taken for this purpose.

After a voluntary sacrifice of part of the adventure, and a consequent escape of the rest from imminent peril, the owner of the ship, or in his absence, the master as his agent, has the duty of having an adjustment made of the general average, and has a maritime lien on the interests saved, and remaining in his possession, for the amount due in contribution to the owner of the ship; and the owner of goods sacrificed has a corresponding lien on what is saved, for the amount due him (*Ralli v. Troop*, 157 U. S. 386).

The work is usually done by an adjuster and often requires a high degree of professional skill. He determines what losses are to be adjusted, what goods contribute, how the values of the receiving and contributory interest are estimated, and when and where the adjustment should be made. He must necessarily bring to this work a special acquaintance with maritime law and the current decisions of the courts on the subject as well as a practical acquaintance with the values involved and the methods of business which they represent. He is, however, merely an expert

without any judicial authority and his work is subject to review by the parties in interest. In practice, the shipowner places in his hands the documents from which the necessary facts can be ascertained; the protest of the master and mariners showing the circumstances under which the sacrifice was made and the manifest of the cargo to show the goods involved will be essential; in addition there may be the report of surveyors as to the condition and value of the ship and other property involved and such other evidence as the adjuster requires to have before him, the valuations of hull, cargo, freight and all other items involved in the contribution, excepting the wages of the master and crew, their personal effects and the apparel, jewelry and baggage of the passengers.

CHAPTER XIV

CRIMES COMMITTED AT SEA

1. Definition.—A crime consists in the violation of a public law either forbidding or commanding an act to be done. One act may constitute several crimes against different jurisdictions, as against a State and the United States and a foreign country. Crimes are classified as treason, felonies and misdemeanors. Treason against the United States consists only in levying war against them, or in adhering to their enemies, giving them aid and comfort. Felonies are crimes punishable by death or imprisonment in a state prison; all other crimes are misdemeanors.

Crimes committed at sea are those accomplished upon the high seas or within the jurisdiction of the admiralty, which extends over all navigable waters. Such crimes are punishable by the United States so far as Congress legislates on the subject and otherwise by the particular sovereignty within whose jurisdiction the offense is committed.

2. Admiralty Criminal Jurisdiction.—The constitutional grant embraces criminal as well as civil cases and no crime can escape punishment because committed on shipboard or on the high seas. The provisions of the Constitution in regard to the trial of crimes under the laws of the United States require the proceedings to be according to the practice of the common law, so that they are before a jury as in ordinary cases and the ordinary rules of criminal law are applied. These crimes are covered by the Criminal Code (10 U. S. Comp St. 1916, 10419–10444; 10445–10462; 10463–10483). There may also be other crimes according to the law of the place where the vessel may be or according to the laws of the State or country from which she hails. Merchant vessels are regarded for many purposes as floating portions of the country to which they belong and of the particular State of their home port. An American merchant vessel on the high seas will therefore continue under the appropriate laws both of the United States and of her own particular State,

and while in foreign ports she will also be subject to local law. She will never be outside the scope of some law and although several jurisdictions may overlap, crimes committed on board will not escape punishment.

3. Place of Trial.—Whenever an offense is committed on board of an American vessel, it is the duty of the master and crew to detain the offender and surrender him to the proper authorities for trial as soon as may be. If the offense is within the limits of a particular State, the trial must be in a Federal court therein; if committed on the high seas, then in a like court of the district wherein the offender is apprehended or into which he is first brought; if within a port of a foreign country, the local laws may prevail. The jurisdiction of every independent nation over the merchant vessels of other nations within its boundaries is absolute and exclusive and arrests may be made thereon and offenders removed for trial according to the laws of the locality. The right of local authorities to search a vessel in their ports for a person charged with crime is established unless modified by treaty. The master is bound to submit to the jurisdiction within which his vessel lies. In practice a distinction is made between offenses affecting the peace and dignity of the foreign country and those only involving the internal order and discipline of the ship. A certain comity preserves the latter from outside interference and local authorities will usually decline to act in such cases or interfere with the general authority of the master. It is frequently provided by treaty that disputes between the masters, officers and crews may be adjudicated by their consuls, provided that they do not disturb the peace or tranquillity of the port.

4. Offenses Not Consummated on Shipboard.—Where the crime is committed on the high seas although not on shipboard, the admiralty jurisdiction as administered by the Federal courts will still be enforced. The case of *Holmes*, 1 Wall. Jr. 1; 26 Fed. Cas. No. 15,383, is an unusual example. The American ship, *William Brown*, loaded with passengers and cargo, struck an iceberg in the North Atlantic and had to be abandoned. Nine of the crew and thirty-two passengers got into the long-boat; Holmes was one of the crew and took charge of her in an attempt to reach Newfoundland, then about three hundred miles away. The long-boat proved leaky and was so seriously overloaded by those on board as to fill with water in the sea which began to rise. In the

face of urgent necessity and under Holmes' general directions, sufficient of the passengers were thrown overboard to enable the boat to float until picked up by a passing ship. Holmes was convicted of manslaughter in the Eastern District of Pennsylvania.

5. Penalties and Forfeitures.—The ship herself may be a quasi-criminal under maritime law. All commercial nations find it necessary for the enforcement of their laws and regulations in regard to commerce by sea, to impose penalties upon the vessel by or through which violations occur. So a vessel which has engaged in any piratical aggression may be condemned and sold for the use of the United States. Violation of a blockade or carriage of contraband of war renders the ship liable to seizure and sale by the Government. A ship licensed for the coasting trade may be forfeited if she engages in any other, and many penalties may be inflicted upon the vessel for acts of which the owner is entirely innocent. Similarly a false oath made in order to obtain the registry of a vessel, or any other fraud for the purpose of obtaining registry, enrollment or licenses will result in her forfeiture, and so will a sale to an alien without complying with the provisions of the statutes (Chapter II, § 10, *supra*). Forfeiture of a vessel will also result from an attempt to change her name, otherwise than by the method provided by law (Chapter II, § 9, *supra*), or to deceive the public as to her true name and character by any contrivance, device or advertisement of law where the owner or the master is privy to the offense, as for example the importation of diseased cattle. The doctrine of the personality of the ship again appears in the criminal law of the admiralty which treats her like an individual for purposes of regulation and punishment. The principle was laid down by Justice Story in the brig *Malek Adhel*, 2 How. (U. S.) 210:

It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offense has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof.

The acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs.

Thus if a vessel fails to carry the wireless equipment prescribed by law a fine is imposed upon the master and is a lien upon the ship enforceable by law in admiralty. The statute governing the equipment of vessels with radio telegraph apparatus is given under § 11 *infra*. Innocent cargo is not involved in the forfeiture of a guilty vessel, and where the owner and master of a vessel is innocent she will not usually be forfeitable by reason of the guilt of the cargo.

The sending, or attempting to send to sea, of a vessel so unseaworthy as to be likely to endanger life, is a misdemeanor for which the person guilty is to be punished by fine or imprisonment, or both (Act of December 21, 1898, § 11), unless he is able to prove either that he used all reasonable means to insure her being sent to sea in a seaworthy state, or that her going to sea in an unseaworthy state was under circumstances reasonable and justifiable.

6. Federal Criminal Code.—This was promulgated by the Act of March 4, 1909, and will be found in 10 Comp. St. 1916, commencing at page 12491. Maritime offenses are grouped in Chapter 11, "Offenses within the admiralty and maritime and the territorial jurisdiction of the United States," and Chapter 12, "Piracy and other offenses upon the Seas." Unlike the legislatures of the several States, which have an inherent power to define and punish any act as a crime, subject to constitutional limitations, Congress is confined to the powers enumerated in the Federal Constitution. In regard to offenses at sea, its power is derived from § 8 of Article I, "To define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations," and from Article III which provides that the judicial power shall be vested "in such inferior courts as the Congress may from time to time ordain and establish" and shall extend "to all cases of admiralty and maritime jurisdiction." Chapter 11 provides for the punishment of murder, manslaughter, felonious and simple assaults, attempts to commit murder or manslaughter, rape, seduction, loss of life by misconduct of officers of vessels, maiming, robbery, maritime arson, larceny and receiving stolen goods, when committed upon the high seas, or any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, or within such admiralty jurisdiction on board of any vessel be-

longing in whole or in part to the United States, or any citizen thereof, or corporation created under its laws or those of any of its States, Territories or Districts; also, when committed upon any American vessel on a voyage on the Great Lakes, or upon any island, rock or key, containing deposits of guano and appertaining to the United States.

Chapter 12 provides for the punishment of piracy; maltreatment of crews; incitement of revolt or mutiny; seamen laying violent hands on commanders; abandonment of mariners in foreign ports; conspiracy to cast away vessels; plundering vessels in distress; holding false lights; attacking vessels with intent to plunder; breaking and entering vessels; destruction of vessels at sea; robbery on shore by pirates; arming vessel to cruise against citizens; piracy under color of foreign commission; piracy by aliens; voluntary surrender to pirates; plotting or corresponding with pirates and selling arms or intoxicants to any aborigines in Pacific Islands. The punishments provided for the offenses in these two chapters are generally severe but in harmony with what experience has shown to be appropriate for the crimes dealt with.

Besides these provisions, the Code, in Chapter 10, deals with the slave trade and peonage; in Chapter 2, with offenses against neutrality; and in Chapter 9, with offenses against foreign and interstate commerce, such as carrying explosives on passenger vessels.

Title LIII Merchant Seaman (7 Comp St. §§ 8380-8391) contains various provisions in respect of offenses and punishments of seamen; desertion; willful disobedience; assaults on officers; damaging the vessel; embezzlement of stores or cargo; smuggling; drunkenness, carrying sheath-knives; unlawful boarding; soliciting seamen as lodgers; and corporal punishment are there dealt with.

7. Concurrent Jurisdictions.—There is no doubt that Congress has the power to make all crimes committed within the admiralty jurisdiction punishable in the federal courts but it has not done so and is not likely ever to so enact. Neither is it likely ever to assert an exclusive jurisdiction over all or any such crimes except as may be in violation of a purely federal enactment. Where this exclusive jurisdiction has not been asserted, either in terms or by necessary implication, state laws are not superseded by federal, and the same act may be punished as an

offense against the United States and also as an offense against the State; it may thus be within the jurisdiction of both federal and state courts or the one may have jurisdiction of it under one aspect and the other under a different phase. The rule of comity is the same as in civil cases; where there is concurrent jurisdiction, the court which first obtains it, will continue to act to the exclusion of the other. Where the defendant obtains an acquittal in one court of concurrent jurisdiction, the judgment is a bar to a subsequent trial in the other, since he is not subject, for the same offense, to be twice put in jeopardy of life or limb.

8. Limitations of Prosecutions.—The right of the government to prosecute for a crime is not barred by any lapse of time unless its statutes so expressly provide. In the federal courts, there must be an indictment within three years after the offense was committed, in most instances; for the slave trade, the term is five years; but these terms do not run while the offender is a fugitive from justice.

9. Piracy.—While the majority of offenses under maritime law only differ from like offenses on land in respect of locality, piracy is confined to the water. Pirates are enemies of all mankind and the offense is against the universal laws of society. There is a piracy, therefore, by the law of nations and those guilty of it are subject to pursuit, seizure and punishment by the vessels of every nation. There is also a statutory piracy which is punishable only within the limits of the jurisdiction which defines it. The pirate by the law of nations is an outlaw whom any nation may capture and punish. He is one who, without legal authority from any state, attacks a ship with the intention to appropriate what belongs to it; in other words, his offense is that of depredation on the high seas without authority from any sovereign state. All private, unauthorized maritime warfare is piratical because it is incompatible with the peace and order of the high seas. It is not necessary that the motive be plunder or that the depredations be directed against the vessels of all nations indiscriminately; it is only essential that the spoliation, or intended spoliation be felonious, that is, done willfully and without legal authority or lawful excuse. In cases of this piracy by international law, it is of no importance, for purposes of jurisdiction, where or against whom, the offense is committed; such pirates may be tried and punished and the ship captured and condemned wherever found. Apart

from international law, any government may declare offenses on its own vessels to be piracy and such offenses will be exclusively punishable by it like other crimes. *St. Clair v. U. S.*, 154 U. S. 134, may be examined in regard to an instance of statutory piracy; while the *Ambrose Light*, 25 Fed. 408, is a very learned and authoritative opinion on the modern views of piracy under international law.

10. Barratry.— This expression frequently appears in maritime law and includes any act done by the master or crew, with criminal intent, in violation of their duty to the shipowner and without his connivance. It is a general term applicable to many criminal acts and therefore not properly classifiable as a crime by itself. The most flagrant form is where the ship is burned, scuttled or stranded by the master or crew. In Marine Insurance it includes every wrongful act willfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer.

Inasmuch as barratry must be directed against or in fraud of the owner, it cannot be committed by a master who is a part owner of the ship, either generally or for the voyage. Thus in the old case of *Marcadier v. Ins. Co.*, 8 Cranch 39, the master abandoned the voyage at an intermediate port for his own emolument and advantage, and, as a result, a quantity of cargo was spoiled. It was contended that he had been guilty of barratry. The Court found, however, that he was the owner of the ship and therefore incapable of committing the offense. In *Ins. Co. v. Coulter*, 3 Peters 222, it was held that gross negligence might be evidence of barratry:

And when it is considered how difficult it is to decide where gross negligence ends and ordinary negligence begins, and to distinguish between pure accident and accident from negligence, we cannot but think that the British courts have adopted the safe and legal rule in deciding, that where the policy covers the risk of barratry, and fire be the proximate cause, they will not sustain the defense that negligence was the remote cause.

This case contains a quaint quotation from the doctrine of Malynes "whose book unites the recommendations of antiquity, good sense and practical knowledge." The passage follows:

Barratry of the master and mariners can hardly be avoided, but by a provident care to know them, or at least the master of the ship

upon which the assurance is made. And if he be a careful man, the danger of fire above mentioned will be the less for the ship; boys must be looked unto every night and day. And in this case let us also consider the assurers; for it has oftentimes happened, that by a candle unadvisedly used by the boys, or otherwise, before the ships were unladen, they have been set on fire and burnt to the very keel, with all the goods in them, and the assurers have paid the sums of money by them assured. Nevertheless, herein the assurers might have been wronged, although they bear the adventure until the goods be landed; for it cometh to pass sometimes, that whole ships' ladinges are sold on shipboard, and never discharged.

11. Failure to Equip with Radio Telegraph.—By Act of Congress approved June 24, 1910, 36 St. at L. 629, it is provided that it shall be unlawful for any ocean-going steamer, whether American or foreign, carrying passengers and carrying fifty or more persons, including passengers and crew, to leave any port of the United States unless equipped with efficient apparatus for radio communication in good working order, capable of communicating over a distance of at least one hundred miles, night or day, and in charge of a competent operator. To be efficient the apparatus must be capable of exchanging messages with stations using other systems of radio communication. A fine of not more than \$5,000 is assessed against the master or other person in charge for violation of the act and as has been said (§ 5 *supra*) the fine is a lien upon the ship. Regulations for the enforcement of the act are made by the Secretary of Commerce. The act does not apply to steamers plying between ports less than 200 miles apart.

12. Failure to Disclose Liens.—By the Ship Mortgage Act, 1920 (see Appendix, Merchant Marine Act, Sec. 30), a mortgagor of a preferred mortgage is required, upon request of the mortgagee, to disclose the existence of any maritime lien, prior mortgage or other liability upon the vessel, known to the mortgagor, and to refrain, until the mortgagee has had an opportunity to record the mortgage, from incurring liens upon the vessel except for wages, general average and salvage. Disobedience to this injunction with intent to defraud is made a misdemeanor punishable by a fine of not more than \$1,000 and imprisonment of not more than two years, or both, and the mortgage debt is to become due immediately.

13. Mutiny.—This term is most often used with reference to an offense committed on shipboard, although technically it is not

peculiar to shipping, but may be committed by soldiers and servants. Mutiny on shipboard is defined as follows: "A revolt or mutiny consists in attempts to usurp the command from the master or to deprive him of it for any purpose by violence or in resisting him in the free and lawful exercise of his authority; the overthrowing of the legal authority of the master, with an intent to remove him against his will and the like." Mere refusal of duty or disobedience by a seaman while liable to punishment by the master is not mutiny, and the conduct may be very aggravating and contumacious without amounting to mutiny. *The Stach Clark*, 54 Fed, 533.

CHAPTER XV

WRECKS AND DERELICTS

1. Definitions.— In a legal sense, the word wreck includes ships and cargoes, or any parts thereof, which have been cast on shore by the sea, and derelict applies to similar property abandoned on the sea. The terms should be understood as limited to things of a maritime nature and as including the old subdivisions of flotsam, jetsam and ligan,— flotsam being the name for the goods which float when the ship is sunk, jetsam meaning those which are jet-tisoned or thrown overboard, and ligan those cast into the sea but tied to a buoy or marker so that they might be found again. Derelict is the term applied to a thing which is abandoned at sea by those who were in charge of it, without any hope of recovery or intention of return.

2. Wrecks under the Common Law.— It is said in *Murphy v. Dunham*, 38 Fed. 503, that the disposition of wrecks and derelicts is usually a fair index of the degree of civilization of the people within whose domains such property is found. In primitive societies, wrecks are treated as the plunder of the finder, or lord of the soil, since title depends on possession and the owner's rights disappear when his goods are separated from him. The common law of England long exhibited this imperfect notion of property. Blackstone, writing about 1760, points out that by the ancient common law, wrecked goods belonged to the King since by the loss of the ship all property left the original owner. This harsh rule was modified by statutes which declared, in substance, that if a man, dog, or a cat escaped alive out of the disaster, it was no wreck but might be reclaimed by the owner within a year and a day. In this country, colonial laws and current statutes have alike repudiated these primitive notions, and reenacting appropriate provisions of Roman and medieval sea-law, provide for safely keeping the property for the space of a year, or other reasonable time, for the owner, and delivering it to him on the payment of reasonable salvage; only in the event of the total failure

of the owner to appear, do the goods or their proceeds pass to the state. The Act of Congress (10 U. S. Comp. St. 1916, § 10470) provides that whoever plunders, steals, or destroys any money, goods, merchandise, or other effects, from or belonging to any vessel in distress, or wrecked, lost, stranded, or cast away, upon the sea, or upon any reef, shoal, bank, or rocks of the sea, or in any other place within the admiralty and maritime jurisdiction of the United States, shall be fined not more than five thousand dollars and imprisoned not more than ten years; and whoever willfully obstructs the escape of any person endeavoring to save his life from such vessel, or the wreck thereof; or whoever holds out or shows any false light, or extinguishes any true light, with intent to bring any vessel sailing upon the sea into danger, or distress, or shipwreck, shall be imprisoned not less than ten years and may be imprisoned for life.

It is interesting to note, in connection with this statute, two Articles of the *Rooles of Oléron*,—

ARTICLE XXV

If a ship or other vessel arriving at any place, and making in towards a port or harbour, set out her flag, or give any other sign to have a pilot come aboard, or a boat to tow her into the harbour, the wind or tide being contrary, and a contract be made for piloting the said vessel into the said harbour accordingly; but by reason of an unreasonable and accursed custom, in some places, that the third or fourth part of the ships that are lost, shall accrue to the lord of the place where such sad casualties happen, as also the like proportion to the salvors, and only the remainder to the master, merchant and mariners: the persons contracting for the pilotage of the said vessel, to ingratiate themselves with their lords, and to gain to themselves a part of the ship and lading, do like faithless and treacherous villains, sometimes even willingly, and out of design to ruin ship and goods, guide and bring her upon the rocks, and then feigning to aid, help and assist, the now distressed mariners, are the first in dismembering and pulling the ship to pieces; purloining and carrying away the lading thereof contrary to all reason and good conscience: and afterwards that they may be the more welcome to their lord, do with all speed post to his house with the sad narrative of this unhappy disaster; whereupon the said lord, with his retinue appearing at the places, takes his share; the salvors theirs; and what remains the merchant and mariners may have. But seeing this is contrary to the law of God, our edict and determination is, that notwithstanding any law or custom to the contrary, it is said and ordained, the said lord of that place, salvors, and all others that take away any of the said

goods, shall be accursed and excommunicated, and punished as robbers and thieves, as formerly hath been declared. But all false and treacherous pilots shall be condemned to suffer a most rigorous and unmerciful death; and high gibbets shall be erected for them in the same place, or as nigh as conveniently may be, where they so guided and brought any ship or vessel to ruin as aforesaid, and thereon these accursed pilots are with ignominy and much shame to end their days; which said gibbets are to abide and remain to succeeding ages on that place, as a visible caution to other ships that shall afterwards sail thereby.

ARTICLE XXVI

If the lord of any place be so barbarous, as not only to permit such inhuman people, but also to maintain and assist them in such villanies, that he may have a share in such wrecks, the said lord shall be apprehended, and all his goods confiscated and sold, in order to make restitution to such as of right it appertaineth; and himself to be fastened to a post or stake in the midst of his own mansion house, which being fired at the four corners, all shall be burnt together, the walls thereof shall be demolished, the stones pulled down, and the place converted into a market place for the sale only of hogs and swine to all posterity.

The Act of Congress and the ancient articles are both occasioned by the persistent notion of loss of title by shipwreck and the right of people on shore to appropriate what they can of the property at risk.

3. **Wrecks within Admiralty Jurisdiction.**—It is sometimes said that the admiralty has no jurisdiction over wrecks, but the statement is correct in only a limited sense. In cases where the property had become quite removed from all connection with commerce or navigation, as where a ship had been thrown far inland by a tidal wave and been converted into a dwelling, or cargo was incorporated into the common mass of property on shore, the admiralty would probably decline jurisdiction. On the other hand, the admiralty law of salvage is based, in large part, on the law of wrecks and derelicts; contracts for the lightering of stranded cargoes or the release of wrecked vessels are obviously maritime and the conversion of shipwrecked property may be a maritime tort when consummated on navigable waters. A steamer which had been wrecked and abandoned to the underwriters as a total loss, and incapable of self-propulsion or of carrying a cargo, still remained within the admiralty law of limited liability (*Craig v. Insurance Company*, 141 U. S. 638). The fact is that the two jurisdictions are largely concurrent on most mat-

ters in regard to wrecks and the instances, in which an adequate remedy can not be found in either, are rare.

4. Liabilities of Owner of Wreck.— It is a general doctrine of the law that the owner of a vessel wrecked without his personal fault may relieve himself from all further personal liability on its account by abandoning it. If sunk through his fault, or if he still retains his title, he may be liable for damage which it occasions, or for maintaining a nuisance, or for obstructing navigable waters. If wrecked by unavoidable accident or without the owner's negligence, he may abandon all his rights and interest in what remains and be freed from all further responsibility; he will be under no obligation to remove it nor subject to indictment on its account, nor liable in damages for injuries caused by it. This abandonment is not required to be in any formal way but is shown by evidence of acts and intention. A notice to any public authorities who may be concerned, like local United States engineers, or harbor masters, or commissioners of wrecks, is often sufficient. Where, however, the owner does not abandon, he remains liable in many respects. The wreck may be a nuisance which the courts will compel him to abate at the suit of property owners injuriously affected. It may be an obstruction to navigable waters and the government may remove it at his expense or proceed against him criminally for such obstruction. Passing vessels may injure themselves against it or the riparian owner assert damages for the trespass.

5. Rights of Landowner.— The owner of the shore on which a wreck is cast is not under any legal obligation to save it for the owner but he may take possession and protect it on the owner's account. If he does so, he will have a lien on the property for his expense and labor, at least, and may stand in the position of a salvor. If he does nothing himself, he may not resist the reasonable efforts of others to save the property for it is a very old rule of the common law, that an entry upon land to save goods which are in jeopardy of being lost or destroyed by water, fire or any like danger, is not a trespass, and this rule is applied to the rescue of ships cast ashore by the sea. At the same time, the owner of the shore will have a sufficient title to goods cast thereon to maintain an action for their value against third parties and salvors should be prompt in seeking the protection of the admiralty if their efforts are successful.

6. Owner's Rights.—The owner's title to his wrecked ship or cargo remains in him until divested by his own act or by operation of law and he has the right to enter upon lands of another, upon which it may be cast, for the purpose of removing it; if prevented from so doing he may have his action of trover for its conversion or a replevin for possession.¹ In case his property was insured and abandoned to his underwriters, they become the full owners thereof and entitled to all his rights on the premises. These rules apply alike to ship and to cargo and to all the parts thereof. In *Murphy v. Dunham*, 38 Fed. 503, may be found an interesting discussion in regard to a wrecked cargo of coal. Dunham owned the schooner *Burt* which was lost in Lake Michigan with about 1,375 tons of coal on board. Murphy bought this cargo from the underwriters who had paid a total loss thereon. About two years afterwards, Dunham located the wreck and raised a quantity of the coal which he sold for the best price obtainable. These proceedings were without any license or authority from Murphy, who had purchased the cargo, and he then sued Dunham for tortious conversion. The court held that Murphy had a valid title and that Dunham was a trespasser in interfering with it; nevertheless if Dunham had promptly libeled it for salvage, his conduct not being marred by bad faith, the admiralty would have awarded him a substantial reward; but as he had assumed to dispose of it at private sale, he must answer in damages, although not as a willful trespasser or one acting in bad faith; he was accordingly held to respond for the value of the coal in the port where he sold it, less the actual and necessary expenses of its recovery. The *Albany*, 44 Fed. 431, is another opinion in regard to the rights of the owners of ship and cargo; as a result of that disaster, the cargo was plundered by wreckers and sold to many persons in the vicinity; the underwriters recovered it by actions in replevin wherever it could be found.

7. Rights of Government.—The Act of March 3, 1899, (10 U. S. Comp. St. § 9920, etc.) contains provisions for the removal of wrecks in navigable waters by the Government. The obstruction may be broken up, removed, sold or otherwise disposed of by the Secretary of War at his discretion, without liability for any damage to the owners of the same. This authority may be del-

¹ These are common-law forms of action for the recovery of property or damage for its detention.

egated by the Secretary of War and permits the prompt removal of wrecks when they interfere with navigation. The rights and power of the Government to so dispose of wreckage can hardly be doubted and similar power probably exists in all foreign jurisdictions as well as in the several states.

8. Derelicts.—Vessels abandoned and deserted at sea, with or without their cargoes, are termed derelicts and may be salvaged or destroyed by whomsoever can do so. They constitute very dangerous obstructions to navigation, especially when afloat on the ocean or the Great Lakes. The question whether or not a vessel is to be adjudged a derelict is decided by ascertaining, not what was actually the state of things when she was deserted by her master and crew, but what were their intentions and expectations when they quitted her. If they left in order to obtain assistance with the distinct purpose to return, there is no derelict. *Prima facie*, however, a deserted vessel at sea is a derelict and subject to salvage services, or, if not salvable, then to destruction by private parties or naval authorities. Salvage of derelicts is always liberally rewarded, sometimes to the amount of the whole recovery. If destroyed, the proceeding must be in entire good faith and, if so, there will be no liability to the owner. In the case of the *River Mersey*, 48 Fed. 686, that steamer had burned a scow found adrift at sea and was libeled for its destruction. It appears that the scow had broken adrift near one of the West Indies and become a dangerous factor in the navigation up and down the coast. The steamer took her in tow in order to drop her inside of the Gulf Stream but, finding this impossible on account of the weather, set her on fire in order to destroy her and so remove a dangerous obstruction to navigation. The owners of the scow alleged that they had not abandoned her and meant to send out a tug to bring her into port. The court dismissed the libel, saying that the destruction of such obstacles to the fairways of the sea, either when abandoned, or when proved not to be worth saving, is not tortious or actionable, but rather a praiseworthy and beneficent service, and, whether done by private or public ships, needs no statutory authority but is entirely justified under the law of necessity, for the protection of life and property, and for the manifest public good.

9. Finders.—The person who finds property lost at sea, or cast upon the shore, is protected against the interference of third

parties although he has no title against the real owner unless that owner had abandoned completely. *Eads v. Brazelton*, 22 Ark. 499, is an excellent opinion on this phase of the subject. The steamboat *America*, laden with a cargo of lead, had sunk in the Mississippi River in 1827. In 1854 Brazelton had discovered the wreck over which an island had formed and a forest grown, and commenced preparations for its recovery. He marked its position and placed buoys around it but was prevented from commencing operations until the next year. In the meantime Eads commenced operations on his own account and Brazelton sought an injunction to restrain him. The original owners did not appear or make any claim. Brazelton was held to have a good title as against any others than the owner on the ground that he was the first finder of an abandoned wreck.

CHAPTER XVI

WHARFAGE AND MOORAGE

1. Definition.—Wharves are structures made to facilitate and aid commerce and navigation and are essential to maritime affairs. They are classed as public and private and frequently regulated by local laws and ordinances. Wharfage means the use by the vessel of a wharf, pier or other landing place and also the compensation for such use; moorage is a practically similar term but may include the use of unimproved property by the ship while anchored or otherwise attached to the shore or lying in a slip. Private wharves are those which the owner has constructed and reserved for his own use but when they are legally thrown open to the use of the public, they become affected with a public interest; the keeping of such a wharf has been likened to inn-keeping or other quasi-public places and all seeking its use are entitled to accommodation at reasonable rates.

2. Right to Erect.—The construction of wharves or piers upon navigable waters is usually governed by federal, state or municipal regulations and, unless appropriate authority is obtained, the erection of such a structure, projecting into the stream, will be unlawful and the person responsible for the obstruction may be liable for any damage resulting from its existence, and may be criminally liable to the federal government and subject to injunctive process for the removal of the structure. This remark does not apply to structures confined wholly to the shores and not projecting. The paramount authority to legislate with regard to wharves in navigable streams resides in Congress, which has enacted that no such structures shall be erected outside of established harbor lines, or where no harbor lines have been established, except by specific authority of the Secretary of War. The Secretary of War is empowered to establish harbor lines where he considers it essential (30 St. at L. 425). It has been held, however, that the power of Congress to regulate the use of navigable waters entirely within the limits of a State is not complete without the concurrence of the state legislature. In most

communities located on navigable waters, there exists a corporate power, conferred by the legislature, to regulate wharves, piers and landings, and in pursuance of such power wharves and harbor lines are frequently established, in the absence of federal action establishing the same.

3. **Duties of Proprietor.**—The owner of a wharf is bound to keep it safe and free from all defects which might injure persons or property using the same. While not an insurer he must use due diligence to make and keep it safe for the uses for which it was constructed or is employed. The analogy is that of the keeper of any structure commonly used by others for compensation and the obligation extends to all who rightfully come upon the premises for business purposes. Thus friends attending upon the arrival or embarkation of passengers, consignees of cargo, hackmen, and customs officers have recovered damages against the owner of a wharf for injuries sustained through its defective condition. So he will also be liable for injuries to vessels caused by rocks or other obstacles beneath the surface of the water or pikes projecting from the wharf. There is an implied warranty that the premises are safe and free from hidden obstructions. Frequent inspections are required in order to ascertain and repair such defects as may be engendered by its use, and if dangers are found to exist, he should close the wharf or give ample notice of its condition.

These principles were invoked in the case of *Onderdonk v. Smith, et al.*, 27 Fed. 874; where a scow and her cargo were sunk in consequence of being punctured by a pile which projected from the bottom of the slip directly under the place where the scow had taken her cargo. The respondent enjoyed the exclusive privilege from the owners of using the pier and the adjoining slip for shipping their coal and to that extent, although they were neither owners or lessees, had control and occupation of the premises. "They assumed the duty toward those whom they invited there for the transaction of business not to expose them to hazard from any defects in the condition of the premises known to themselves or which, by the use of reasonable diligence, should have been known." Their superintendent knew of the existence of the pile and they were, therefore, chargeable with notice, because about three weeks before the accident in suit another boat had been struck by the same pile. The Court said:

If the scow had been injured by this obstruction while being loaded at the pier, or while going to it or away from it in the prosecution of the business which called her there, the case of the libellant would be clear. But the evidence is that her loading was completed at half past 4 o'clock in the afternoon, when the water was a little below high tide, and the accident happened about half past 9 in the evening, when the tide was low ebb; and if the scow had been removed from the place where she was loaded within a reasonable time after the loading was completed, she would not have been injured. When the tide went out, the scow settled down upon the pile, which projected about a foot from the bottom of the slip, and sufficiently far to puncture the boat at that condition of the water.

The only liability of the defendants grows out of their duty arising from their implied invitation to others to use the pier for the transaction of the business to which the pier was appropriated. Their invitation was spent when the boat's business at the pier was finished, and a reasonable time had elapsed to enable her to move away. After that she remained there at her own risk. It is not necessary to hold that she was there against the permission of the defendants, and therefore a willful trespasser; but, assuming that she was there without having obtained the permission of the defendant's superintendent, the defendants were not under any obligation to concern themselves for her protection. Under such circumstances, the law imposed no duty upon the defendants except the general duty which every man owes to others to do them no intentional wrong or injury.

Owners of private property are not responsible for injuries caused by leaving a dangerous place unguarded, when the person injured was not on the premises by permission, or on business, or other lawful occasion, and had no right to be there. One who thus uses another's premises cannot complain if he encounters unexpected perils.

In *Smith v. Burnett*, 173 U. S. 430, a schooner while moored in berth at a wharf on the Potomac River for loading, was sunk by a submerged rock within the limits of the berth at the wharf, which the master was invited to take, the obstruction being unknown to the master and having been assured by the owners of the wharf, through their agent, that the depth of water in the berth in front of the wharf was sufficient and that the berth was safe for the loading of vessels. Chief Justice Fuller, discussing the English and American authorities said:

Although a wharfinger does not guarantee the safety of vessels coming to his wharves, he is bound to exercise reasonable diligence in ascertaining the condition of the berths thereat, and if there is any

dangerous obstruction, to remove it, or to give due notice of its existence to vessels about to use the berths. At the same time the master is bound to use ordinary care, and cannot carelessly run into danger.

4. Rights of Proprietor.—The owner of a private wharf is entitled to compensation for its use by others or to reserve it entirely for his own accommodation. Riparian owners may construct and maintain, for their own exclusive use and benefit, private wharves on their own property, and, so long as they do use them, and refrain from giving them a public character, may deal with them as other private property. If a vessel is wrongfully moored to such a private wharf, the owner may cast it adrift and will not incur any liability if, in consequence of his act, the vessel becomes stranded and lost. In the interesting case of *Dutton v. Strong*, 1 Black 23, a vessel in peril running into a harbor in the night made fast to a pier, which was the private property of the riparian proprietor, without securing his permission. The force of the sea causing the vessel to pound and parts of the pier beginning to give way, the proprietor of the pier warned the master to leave. The master, believing that such a course would imperil his vessel, did not do so and the pier owner cast her loose, as a result of which she was so seriously injured that her master was obliged to scuttle her. The owner of the vessel brought action for damages. The court (Clifford, J.) said:

Piers or landing places and even wharves, may be private, or they may be in their nature public, although the property may be in an individual owner; or, in other words, the owner may have the right to the exclusive enjoyment of the structure, and to exclude all other persons from its use; or he may be under obligation to concede to others the privilege of landing their goods, or of mooring their vessels there, upon the payment of a reasonable compensation as wharfage; and whether they are the one or the other may depend, in case of dispute, upon several considerations, involving the purpose for which they were built, the uses to which they have been applied, the place where located, and the nature and character of the structure. Undoubtedly, a riparian proprietor may construct any one of these improvements for his own exclusive use and benefit, and, if not located in a harbor, or other usual resting place for vessels, and if confined with the shore of the sea or the unnavigable waters of a lake, and it had not been used by others, or held out as intended for such use, no implication would arise, in a case like the present thus the owner had consented to the mooring of the vessel to the bridge pier.

Accordingly it was held that:

When it became obvious that the necessary effect of the trespass, if suffered to be continued, would be to endanger and injure or perhaps destroy the pier, the peril of the vessel imposed no obligation upon the defendants to allow her to remain and take the hazard that their own property would be sacrificed in the effort to save the property of the wrongdoers. On the contrary, they had a clear right to interpose and disengage the vessel from the pier to which she had been wrongfully attached, as the only means in their power to relieve their property from the impending danger. They had never consented to incur that danger, and were not in fault on account of the insufficiency of the pier to hold the vessel, because it had not been erected or designed as a mooring place for vessels in rough weather, and it was the fault of the plaintiffs or their agent that the vessel was placed in that situation.

The proprietor of a private wharf may fix any rate he pleases for the use of such a wharf and those employing it, after due notice of the charge, will make themselves liable to pay it. This rule of private property, however, applies only to the purely private wharf and slight circumstances may be sufficient to give it a public character. It has, indeed, been held that where the wharf constitutes the only means by which the people of a community can reach the water and have the benefit of the means of commerce and navigation thereon, the structure is necessarily impressed with a public interest and may not be monopolized to the exclusion of others.

5. Wharfage Compensation.—The compensation for the use of a private wharf depends on the bargain of the parties concerned. When there is an express contract, that will control; if the rate is published, the vessel impliedly promises to pay it when she uses the wharf; such publication may be by a sign or placard on the wharf or by any other method of conveying actual notice of the rate. Where there is no express agreement, or published rate, there is an implied promise to pay a reasonable compensation or customary charge for the use of the property. The same rule applies to cases of overlapping, where a vessel moored at one wharf projects over another to a greater or less extent. In the case of the *Hercules*, 28 Fed. 475, a tug 80 feet long habitually used a wharf of only 59 feet and so overlapped the adjoining wharf although she did not actually use it for loading or unloading. The proprietor gave a general notice that he would claim compensation and later filed his libel therefor. The court sustained his position, but, as no rate had been named, re-

ferred the matter to a commissioner to report on what a reasonable amount would be. In other than matters of private wharfage, the compensation is frequently regulated by local law.

6. **Lien.**— There is a maritime lien upon a vessel for wharfage in all cases where the ship is foreign, and, by the weight of authority, this lien also arises in the case of domestic vessels. In all cases of domestic vessels, however, the States may provide liens for wharfage, by local statutes, and these will be enforced in the admiralty if the conditions of such statutes have been observed. It has, however, been rather generally held that this lien only attaches when the ship is actively engaged in commerce and navigation and can not be created when she is out of commission and laid up for storage purposes. So, in localities where navigation is closed during the winter months, it is said that there is no lien for winter wharfage and intimated that the proprietor should secure himself under his common-law lien by declining to surrender possession of the vessel until his charges are paid. The lien has also been given a high rank, under some decisions, and placed next after sailors' wages, although the propriety of this may seem open to question. It is inferior to a "preferred mortgage" given on an American ship pursuant to the Merchant Marine Act of 1920 (see Appendix). It is essential, of course, since the lien depends on contract, express or implied, that it should be treated by some one having due authority to pledge the credit of the ship.

7. **Injuries to Wharves.**— Cases of collision between ships and wharves are very frequent and the damages caused thereby are a well recognized subject of marine insurance for which the underwriters agree to indemnify the vessel when it has been compelled to pay them. Damage to the wharf can not be recovered in the admiralty because the tort is not maritime; it is not consummated upon the water but on the land of which the wharf is a part. The wharf owner must, therefore, sue at common law or under local statutes; he has no maritime lien for the injury. On the other hand, the injuries received by the ship are consummated on the water and fall within the jurisdiction of the admiralty; the ship, however, can not libel the wharf because that is a fixed structure and not subject to maritime liens; its remedy is by a libel *in personam* against the wharf owner. If the wharf is a lawful structure and the ship negligently runs into it, full

damages may be recovered at law. Where the structure is unlawful, the ship may recover its damages, in whole or in part, as the fault may lie, in an admiralty proceeding. *Atlee v. Union Packet Co.*, 21 Wall. 389, was a case where a barge was sunk by a collision with a stone pier in the Mississippi river which had been placed there without authority of law. The pilot of the barge was also at fault in assuming to take her through the channel without posting himself about the location of the pier. The proceeding was a suit in admiralty by the owner of the barge against the owner of the pier, and, both being considered in fault, the damages were divided. In connection with the subject of admiralty jurisdiction it should be noted that while it declines to take cognizance of the damages sustained by the owners of fixed structures from collisions with vessels, the shipowners, by filing a petition under the Limited Liability Act, may draw their claims into the admiralty and enjoin their actions at common law (*Richardson v. Harmon*, 222, U. S. 96.).

Injuries are often sustained by docks and wharves when vessels make fast thereto in stress of weather and can not leave without exposing themselves to destruction. The rule is that the shipowner may not save his own property at the expense of the wharfowner but must compensate him for the damage done by his ship, although the master had no alternative but to remain as he did. *Vincent v. Company*, 109 Minn. 456, is a decision in point, and *Dutton v. Strong*, 1 Black 23, should be read in the same connection.

8. Anchorage.—The rights of navigation are usually paramount in all navigable waters and the right of anchorage is essential for a full enjoyment of such rights. These waters are, in many respects, like highways on the land, and there is a like privilege of stopping upon them, from time to time, as an incident to the right of travel thereon, subject to the reasonable requirements of traffic and the rights of abutting property. The right of passage extends to every part of the water, but the right of anchorage is confined to such places as are usual or reasonable, in view of local conditions. It does not imply the power to remain for long periods of time or to create a nuisance. Charges for anchorage may be made by the owner of the property used if it is an artificial one so that his work in improving or rendering it accessible forms a consideration for the amounts required. Gen-

erally, where only a natural roadstead is utilized in the course of navigation, it is no more subject to expense to the vessel than the temporary stopping of a vehicle upon a street.

The vessel, being at anchor in a proper place and otherwise complying with law, is not liable for damages sustained by collision with it, but, obviously, will have a strong case against the ship which runs her down. She ought not to anchor in an exposed situation, except in cases of necessity, and then only as long as the necessity prevails.

9. Obstructions to Navigation.—Anchored vessels, like wharves, piers and the like, may constitute serious obstructions to navigation but this does not give others the right to run them down. Approaching vessels are still bound to use ordinary care and skill to avoid them. It is the duty of a ship under way, whether the vessel at anchor be properly or improperly anchored, to avoid, if it be possible with safety to herself, any collision whatever, and the courts have frequently held that even if a ship is brought up in the fairway of a river, if the other could with ordinary care have avoided her, the latter will be held solely to blame. In the case of the *Future City*, 184 U. S. 247, a tug and tow descending the Mississippi River at New Orleans, upon rounding a point came in collision with several battleships of the United States Navy, anchored in line on swinging chains. It appeared that they had taken up these berths in the fairway for descending vessels contrary to the usage of the port and against the advice of the Board of Harbor Masters, who, however, had no authority over naval vessels. There was abundance of good anchorage elsewhere in the harbor. The Supreme Court held the Government liable for the negligent anchoring of the naval vessels and that the tug was not guilty of contributory negligence in being unable, after rounding the point, to check the headway which the current of the river imparted to the tow.

The Court quoted with approval the language of Spencer on *Marine Collisions*:

It is negligence for a vessel to moor so near the entrance to a harbor that shipping, entering in stress of weather, is liable to become embarrassed by its presence; and where the usual difficulties of navigation make the entrance to a harbor a dangerous undertaking, it is especially reprehensible for a vessel to moor in a situation tending to increase these difficulties.

Where a vessel is at anchor in a proper place, and is observant

of the precaution required by law, it is not liable for damages sustained by a vessel in motion colliding with it, but where it anchors in an unlawful position, or fails to observe the statutory requirements and such other precautions as good seamanship would suggest, it must suffer the consequences attending a violation of the law.

In cases like these, the admiralty is inclined to follow the rule of the famous donkey case (*Davies v. Mann*, 10 M. & W. 546), where the owner of the animal had fettered its forefeet and, in that helpless condition turned it into a narrow highway; then the defendant's wagon came along very fast and carelessly and the donkey was crushed; the defendant had to pay for it because, if the driver of the wagon had been decently careful, the consequences of the negligence of the owner of the donkey would have been averted. Any vessel not "under way," as when aground, moored, or at a wharf, is in the position of anchored vessel and subject to similar rights and liabilities.

CHAPTER XVII

ADMIRALTY REMEDIES

One of the reasons for the continued vitality of the admiralty lies in the efficiency of the remedies which it affords. If it were not for these it is quite possible that it would long since have been absorbed by the common law as was the law merchant many years ago. Parties having rights to enforce will usually resort to the admiralty in preference to any other court if the selection is open to them. This is not so much by reason of any difference in the law as in the methods of its application. Admiralty remedies may be divided into proceedings *in rem*, *in personam*, and under the Limited Liability Act.

1. **Proceedings in Rem.**—This procedure is peculiar to the American admiralty and does not exist in the common law. As the name indicates, it is directed against the thing itself to enforce property rights which inhere in it, mainly maritime liens. It belongs to the courts of admiralty exclusively and similar remedies attempted to be given by state statutes are unconstitutional and void. The characteristic feature of this proceeding is that the vessel or thing proceeded against is itself seized and impleaded as the defendant and is judged and sentenced accordingly. Sales made under it are good against all the world while at common law it is only the title of the defendant which is affected and the title conveyed can never be better than his own. The nature of the proceeding is more apparent when it is noted that the admiralty personifies the ship and considers her capable of incurring legal obligations entirely irrespective of her owner's personal responsibility therefor. There is no such doctrine in the common law.

American courts of admiralty — that is to say, the United States district courts — take jurisdiction *in rem* not only of domestic vessels but of ships flying foreign flags, and of controversies originating on the high seas and in foreign waters. The test is, whether the subject matter is within admiralty jurisdiction. The admiralty courts are not bound to take jurisdiction of contro-

versies between foreigners, but they may exercise it in their discretion and frequently do so, applying the principles of international law or the *lex loci contractus*. In the exercise of their discretion to take jurisdiction of suits between foreigners, the courts give consideration to the wishes of consuls of the nations involved, though they are not bound to do so. The United States courts have jurisdiction *in rem* for supplies furnished American ships in foreign ports and foreign ships in American ports. They may in their discretion take jurisdiction of claims for wages by foreign seamen against foreign ships in American ports, and, of course, of claims of American seamen against foreign ships. The principle upon which the court is to determine whether to exercise jurisdiction is whether the rights of the parties would best be served by retaining the cause or remitting it to the foreign court.

Foreign governments sometimes own or operate merchant vessels, and a serious question arises, as yet undetermined by the Supreme Court, whether such vessels are, like naval vessels, exempt from maritime liens, or whether they are subject to the process *in rem* of the admiralty courts. By the act of March 9, 1920, Shipping Board vessels are immune from arrest, but provision is made for suit *in personam* against the government. Vessels of the Panama Railroad, although it is a government agency, are subject to suits *in rem*.

2. **When Proceedings in Rem Will Lie.**—Generally speaking, every maritime lien includes the right to enforce it by a proceeding *in rem*. The person who has a maritime lien upon a vessel is entitled to proceed directly against her in a court of admiralty for the locality in which she happens to be. Thus in all suits by materialmen for supplies, repairs, or other necessities; in all suits for mariners' wages, pilotage, collision, towage, hypothecation, bottomry, salvage, and the like, the process may be *in rem*.

3. **The Libel.**—No process or writ can be issued by a court of admiralty before a libel is filed in the clerk's office. A libel is the statement of the party's claim and the relief or remedy which he desires. It states the nature of the cause, for example, that it is of contract, or of tort or damage, or salvage, as the case may be; the ship, or property, against which the claim is made and that it is, or soon will be, within the district; the facts upon

which the claim is based; and the relief sought. For convenience, it should be expressed in concise paragraphs or articles, and, of course, must state a case within the jurisdiction of the court.

4. **The Writ or Process.**— Upon a libel being properly filed in the office of a clerk of a district court of the United States, a writ of attachment is prepared and delivered to the marshal which commands him to arrest and take the ship, goods or other things into his possession for safe custody; and to cause public notice thereof, and of the time fixed for the return of the writ and the hearing of the cause, to be given in such newspaper within the district as the court shall order. It is then the duty of the marshal to obey the writ, arrest the property and give due notice according to law.

5. **Owner's Rights.**— The owner whose vessel is seized in admiralty is entitled to release her immediately by giving a bond to secure payment of the libellant's claim. This bond may be in double the amount of the claim, or for such smaller amount as may be agreed upon between the parties, or for the appraised value of the ship. In practice, such bonds are usually arranged between the parties and their proctors¹ without the expense and delay incident to an actual seizure. It is not unusual to notify the owner of the commencement of the suit before process is issued and he will generally agree to appear and bond accordingly. This, however, is only courtesy and not a matter of right. At the same time the amount of the bond can be arranged and, when filed, the suit proceeds as if there had been an actual arrest and bonding. The bond takes the place of the ship for all legal purposes and she proceeds about her business entirely freed from the lien in suit.

The owner must establish his status with the court by filing a claim. This is a formal statement on oath of his title to the property. If he desires to contest the libellant's demand, he must file an answer to the libel. The cause is then at issue and will be disposed of by the judge in due course. The time will depend largely on the parties.

6. **Default.**— If the owner does not claim and bond his ship on the return-day named in the writ, the libellant may take his default. The court then investigates the demand *ex parte* and

¹ In admiralty an attorney is called a proctor. The term is being generally abandoned.

makes an appropriate decree for the sale of the ship to satisfy the amount due.

7. Interlocutory Sales.— When the property remains in the custody of the marshal and is subject to undue expense or risk of loss, the court may order its immediate sale for the benefit of all concerned. The proceeds are paid into the registry of the court and represent the ship for all purposes up to the time of the sale. The purchaser at such a sale, as well as at a sale under a final decree, obtains a clear and perfect title, if the proceedings have been in accordance with law. All claims and liens are relegated to the proceeds.

8. Intervenor.— All persons legally interested in a ship are entitled to appear and be heard by the court when she is in the custody of a court of admiralty. Such are parties having other maritime liens upon her and mortgagees. Their claims are presented, pursuant to the public notice given by the marshal, by intervening libels or petitions and they are called intervenors. The form of such petitions is substantially like that of an original libel. Generally when an owner will not bond his ship, she has become heavily in debt and all her creditors will be obliged to intervene in the proceeding in order to protect their accounts. A sale is accomplished and the proceeds brought into court as soon as possible. Distribution is then made between the various lienors according to their rank and priority. Any surplus will belong to the owner and he may obtain it at any time before it is covered into the Treasury of the United States as unclaimed funds.

9. Costs and Expenses.— These are largely within the control of the parties and become heavy only to the extent that the court is burdened with the care of the property or its proceeds. If promptly bonded, the necessary costs are very small. If the marshal remains in possession, his costs will include ship-keeper's charges and all other expenses which the situation occasions. If he sells, there will be his commission on the amount realized, $2\frac{1}{2}$ per cent. on sums under five hundred dollars and $1\frac{1}{2}$ per cent. on sums in excess; the clerk will be entitled to a commission of 1 per cent. for handling the proceeds. His other necessary costs are small. Where, however, there is prolonged litigation, the expenses may become very heavy, especially in respect of stenographer's accounts and the fees of commissioners to whom matters of detail may be referred.

10. Proceedings in Personam.—Suits may also be brought against a defendant personally in the admiralty, where the subject matter is maritime and a personal liability exists. Such a liability always attaches to the person who made the contract or did the wrong for which the action is brought. In a few instances of maritime torts, like assaults and beatings on the high seas, the remedy is *in personam* only.

11. Process in Personam.—The writ here is usually a simple monition or summons to appear and answer the libel, like the ordinary writ in an action at law, but where the defendant cannot be found within the district, it may contain a clause for the attachment of his goods and chattels, or garnishment of his credits and effects. This proceeding is often very effective in obtaining security for the judgment when the proceeding *in rem* cannot be employed.

12. Proceedings in Limitation of Liability.—The shipowner is entitled to limit his liability on account of the ship to its value in many cases and the General Admiralty Rules promulgated by the Supreme Court provide a very valuable proceeding for this purpose. In substance, whenever an owner is threatened with a multiplicity of suits on account of damage done by his ship, or by a claim or claims in excess of her value, and he is not personally liable on such account, he may file a petition in the proper court and surrender the ship to a trustee or give a bond for her appraised value. All other suits are thereupon stayed and all creditors must present their claims in the proceeding which he has so instituted. In effect, it is a maritime bankruptcy by which the ship, or her value, is surrendered to creditors for *pro rata* division and the owner goes free from further claims. It is the application of one of the underlying doctrines of the maritime law by which a shipowner, on abandoning the ship, can protect himself from further responsibility on her account.

APPENDICES

APPENDIX I

SUMMARY OF NAVIGATION LAWS OF THE UNITED STATES

JASPER YEATES BRINTON¹

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¹ Of the Philadelphia Bar.

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SUMMARY OF THE NAVIGATION LAWS OF THE UNITED STATES

While the navigation laws of the United States are in many respects the most advanced and progressive of any in the world, the form in which they exist is far from satisfactory and is a serious handicap on their usefulness. They are voluminous and complicated and in much confusion. Even on comparatively simple topics it is often impossible to distinguish the law of to-day from the law of yesterday.

The reason is not hard to find. It lies in the fact that these laws represent one of the oldest bodies of statute law in the books, and for well over a century have been subject to a steady piecemeal amendment, but with little or no attempt at revision or codification. The result is that on almost every subject there is a bewildering overgrowth of laws—law after law covering and partly modifying, but seldom explicitly repealing, the older law, which thus remains as a stumbling block to even the expert reader.

A complete revision is urgently needed and has been undertaken by the Shipping Board. In the meantime, it is of course desirable that knowledge of the laws as they exist shall be made as conveniently accessible as possible and the summary herewith is presented as a contribution towards that end. It does not pretend to be either complete or exhaustive, but merely undertakes to cover very generally the principal topics, with a somewhat more extended reference to the practical aspects of ship registry as embodied not only in the laws but in the regulations and practices which have grown up around them.

Most of the statutes which have been summarized herein except the recent Merchant Marine Act (Jones Bill) and other laws of this year will be found in the 600 page compilation of the Navigation Laws (1919) prepared with the thoroughness and accuracy to be looked for from any work issued under the direction of the present Commissioner of Navigation. It may be procured from the Superintendent of Documents, Washington, at the cost of one dollar. Subject to the obvious limitations on any compilation which must necessarily include a large body of conflicting and practically obsolete statutes, the work is in every respect admirable. The volume, however, is confined to

statute law, and for much of the practical information covering those branches of operation of ships involving the agency of the customs service, including the documentation of vessels, reference must be had to the Customs Regulations, the last edition of which was published under date of 1915, and which may also be secured from the Superintendent of Documents.

In addition to these two principal compilations reference should also be made to the series of Rules and Regulations of the Board of Supervising Inspectors, issued by the Steamboat Inspection Service, Department of Commerce, to the various publications of the Department covering the Rules of the Road, the International Rules, the Inland Rules, and the Pilot Rules, respectively, together with the notable series of pamphlets issued by the Department from time to time, covering such special subjects as the Measurement of Vessels, the Comparative Study of Navigation Laws of the Maritime Nations, and other similar topics. So far as the writer is aware, however, there is no volume which contains any general summary of the whole body of our navigation laws.

I. SHIP REGISTRY

General.— Under the power to regulate commerce Congress, among its earliest enactments, adopted a system of ship registry for American-owned bottoms and created the class of vessels to be known as “vessels of the United States.” The purpose of establishing this system was the double one of encouraging domestic commerce and of building up our national defense. It did not require and (with certain war-time exceptions) has never required that American-owned ships should be registered, but by imposing prohibitory penalties on foreign trade in American-owned vessels which are *not* registered, and by closing the coasting trade entirely to all except American-owned vessels (or vessels operating during war time under special permission of the Shipping Board) it made the securing of appropriate documents—a register—an enrollment and license—or a simple license, as the case may be,—a practical necessity for American-owned vessels engaged in American trade. In passing it is to be noted that while a ship’s registry is a special document, distinguished from the enrollments and licenses of smaller vessels, the word *registry* is commonly used as covering generally all three classes of documentation.

Registry and Nationality.— While vessels, like citizens, are commonly said to have a nationality, their *nationality* is not necessarily a matter of *registry*. Nationality means rather—To what country does the ship in fact belong and to whose protection is she entitled? As far as the United States is concerned this nationality—this right to protection—depends upon *ownership*.

Therefore, if a ship is actually owned by American citizens, her nationality is American, and she is entitled to the protection accorded to American property all the world over, regardless of the fact that

for any reason she may not be entitled to, or may not desire to take, American registry.

Registry and the Flag.—In the same way, the right to fly the American flag is not dependent upon American registry, but upon American ownership. The flag is only the symbol of nationality and of a right to protection. It is the signal to other vessels at sea—conveying information as to nationality, just as her other signals are used to convey the name of the private owner or of the line to which she belongs. It follows that the American flag may be flown upon any vessel owned by American citizens. For many years vessels of this character flying the American flag have been familiar in the trade in the Far and Near East.

The rule as to the use of a flag is somewhat different and more strict in England. Under the Merchant Shipping Acts the use of a British flag on board a ship owned either in whole or in part by persons not lawfully qualified to own a British ship, subjects the vessel to forfeiture. But there are no such provisions in the law of the United States and questions as to the improper use of the flag of this country upon vessels have not arisen, although occasional diplomatic negotiations have been undertaken to prevent the use of the American flag in foreign countries. Generally speaking it may be said that the United States has been extremely lax in regulating the use of her flag.

Registry and Ownership.—Just as registry is not necessary to give nationality, with its corresponding right to protection, so it is true that the transfer of title to ships is not dependent upon its registry laws. While title to a ship must be passed by bill of sale, this does not depend upon any requirement of the United States law, but arises out of the general maritime law. It is only in the case of ships that are to be registered or enrolled that it is necessary that the transfer be made according to the particular and very specific form prescribed by the registry acts.

Vessels Entitled to American Registry.—Under the early ship registry acts, and for a period of over 120 years, American registry was confined to American-built ships. Such alone were "deemed vessels of the United States, and entitled to the benefits and privileges appertaining to such vessels." As already noted, these privileges were, in effect, the right to engage in American trade.

In 1892, a special act was passed granting American registry to certain foreign-built vessels of the American Line under conditions as to the building of other vessels, but this was a special and very limited proviso.

The Panama Canal Act of 1912, however, made a radical change in our policy and opened American registry to foreign-built vessels not over five years old, owned by American citizens, although denying to these vessels the privilege of entering the coasting trade.

The Ship Registry Act of 1914 went a step farther and removed the limitation as to age, and also authorized the President to suspend, as to these vessels, the rigorous provision that the watch officers of

all vessels engaged in foreign trade should be citizens of the United States. This authority was exercised by the President and many such vessels have been registered.

In 1915 a law was passed to facilitate the transfer of American-owned vessels from foreign to domestic registry by a repeal of the prohibitory duties on such vessels on condition that before leaving an American port they should secure the necessary documentation.

The Shipping Act of 1916, as amended in 1918, and again by the Merchant Marine Act of 1920, further enlarged the scope of the registry laws by providing that vessels (whatever their previous history) purchased, chartered or leased from the Board by citizens of the United States may be registered, or enrolled and licensed, or both enrolled and licensed, as vessels of the United States and entitled to the benefits and privileges of such documentation.

The various classes of vessels now entitled to registry under these laws may be thus divided:

(1) American-built vessels which have always been American-owned;

(2) American-built vessels formerly owned by foreign owners, but subsequently purchased by American citizens;

(3) Vessels captured in war lawfully condemned and owned by citizens;

(4) Vessels forfeited for breach of the laws;

(5) American-built vessels sold by the government to citizens, and foreign-built vessels bought or chartered by the government and sold to citizens;

(6) Vessels whose documentation is authorized by special act;

(7) Wrecked vessels purchased by citizens and repaired in American shipyards on proof that the repairs are equal to three times the appraised salved value; this is a special permission which is a dead letter except as to the coastwise trade, as wrecks can now be admitted to registry for foreign trade regardless of the amount of repairs;

(8) Vessels for foreign trade wherever built, wholly owned by citizens of the United States;

(9) Vessels purchased, chartered or leased from the Shipping Board by citizens of the United States.

Barges, lighters and other boats provided with sails or internal motive power, if falling within these classifications, are entitled to documents, as also barges and boats without sails or internal motive power engaged in the Canadian trade or employed upon the marine waters of the United States or engaged in the carriage of passengers.

The following classes of vessels are not within the provisions of the registry laws and therefore require no documents:

(1) Boats or lighters not masted, or if masted and not decked, employed in the harbor of any town or city and not carrying passengers.

(2) Barges or canal boats or boats without sails or internal motive power employed wholly upon canals or on the internal waters of the state and not engaged in trade with contiguous foreign territory and in carrying passengers;

(3) Barges or boats without sail or motive power, plying on inland rivers or lakes of the United States, also not engaged in trade with contiguous foreign territory and in carrying passengers;

(4) Vessels plying waters wholly within the limits of the state having no outlet into a river or lake on which commerce with foreign nations or among the states can be carried on.

Forms of Register, Enrollment and License.—The Law provides for three classes of documents: (1) A Register; (2) An Enrollment and License; (3) A License.

Originally the license, which is applicable only in the coasting trade, was an altogether separate document from the enrollment, the form of each document being provided by statute. In 1906, however, the two documents were consolidated into one, so far as enrolled vessels were concerned, leaving the license only to be required in the case of smaller vessels. As the law now stands these documents are distinguished as follows:—

Registry is required for vessels engaged in the foreign trade and in the trade with our insular possessions, except Hawaii and Porto Rico, and is *permitted* to vessels engaged in the domestic trade under certain requirements as to entry at the Custom House when laden with certain commodities, etc. There is but a single form of register.

Enrollment of License is required for vessels of twenty tons or over when engaging in the coasting trade. Separate forms are issued for the coasting trade or fisheries, and for yachts.

License alone is required for vessels between five and twenty tons when likewise engaged in the coasting and fishing trade.

Vessels of less than five tons may not be licensed, nor may pleasure vessels of less than sixteen tons be documented except under special instructions from the Department of Commerce.

In general form and purpose these documents closely resemble each other and further consolidation and simplification is badly needed.

Restrictions as to Coastwise Trade.—From 1817 until the recent war the coastwise trade of the United States was limited to vessels of the United States. This restriction, however, was removed by the shipping Act of 1916. Under this act (§ 9) the Shipping Board was authorized generally (with certain very limited exceptions) to purchase, lease and charter vessels suitable for its purposes, regardless of whether foreign-built or not, and also to sell and charter the same to citizens of the United States, such vessels being entitled to American registry. As to all such vessels the Act specifically provided that they should be permitted to engage in the *coastwise* trade. This privilege was also extended to vessels owned, chartered or leased by the Emergency Fleet Corporation (see § XXV, below).

In addition, under an act passed in 1917, the Shipping Board was given authority in its discretion to permit vessels of *foreign registry*, and foreign-built vessels which had been admitted to American registry under the Act of 1914, already referred to, to engage in coastwise trade during the war, and for three months thereafter.

This latter act has been in terms repealed by the Merchant Marine Act of 1920, but with the proviso (§ 22) that all foreign-built vessels admitted to American registry, which were owned on February 1, 1920, by citizens of the United States, and all foreign-built vessels owned by the United States on the date of the signing of the Act (June 5, 1920), when sold and owned by citizens of the United States, may engage in the coastwise trade so long as they continue in such ownership.

The general policy above outlined is supplemented by a further proviso of the Merchant Marine Act (§ 27) forbidding the transportation of merchandise between points in the United States, or such of its possessions as are subject to the operation of the coastwise laws, in any other than documented vessels of the United States, owned by citizens of the United States, except in the case of the vessels to whom the privilege has been extended by the provisions above referred to.

Procedure for Documenting Vessels.—Marine documents are issued by the Collectors of Customs for the various collection districts, one district frequently including several ports. The District of Philadelphia, for instance, includes Camden, Gloucester City, Chester, Somers Point, Tuckerton, Thompson's Point, Wilmington and Lewes.

Practically each step in the process of securing the ship's papers is marked by the production or issuance of one or other of a number of important documents. These steps are as follows:

1. *Presentation of Carpenter's Certificate.*—The Carpenter's Certificate, sometimes referred to as the Master Carpenter's Certificate or Builder's Certificate, is the starting point of the vessel's official status in the eyes of the government, and is the first document to be produced before the Collector. It is the vessel's birth certificate, and is required in order to fix the origin of the vessel, to secure and place on record the best evidence as to the date and place of its building, the name of its builder, and its general description, given under the oath of the builder. For the purpose of this certificate the time of building is the time of completion; the place of building is that where the hull was built. Both of these facts must appear on all marine documents. The Carpenter's Certificate is not a document of title and does not of itself vest any interest in the person holding it. It is sufficient to authorize the vessel to be removed from the district where she has been built to another district in the same or an adjoining State where its owner resides, provided it be in ballast only. This document is filed of permanent record in the Custom House where the vessel receives her papers. The difficulties frequently encountered in the way of securing the certificate of the builder himself have led to the adoption of a regulation permitting other competent evidence establishing the same facts, subject to the approval of the Commissioner of Navigation.

2. *Surveyor's Certificate of Measurement.*—The measurement of the boat contained in the Carpenter's Certificate not having been made

by a government officer, is not an official measurement. It is therefore specifically required that there shall be produced a certificate of such an official measurement made, prior to every registry, by the Surveyor of Customs or by some person appointed by him, at the port where the vessel is, or if there be no such officer, by some one appointed by the Collector. The Surveyor is the "outside man" in the Custom House administration, the official who superintends and directs the inspectors and weighers, who visits all vessels as they arrive in port each day, and who incidentally is charged with this particular duty of measuring vessels for register. His certificate of measurement is required to show not only the measurement of the vessel, i. e., length, breadth, depth, etc., but her build, her tonnage, number of decks and masts. It is also required to state that the vessel's name and the place to which she belongs are painted on her stern. Once measured, it is not necessary that the vessel shall be measured again upon each successive register. Like all the other documents incident to the registration of the vessel, the form of this document is provided by the government and must be countersigned by an owner, or by the master, or by the owner's agent.

3. *Securing and Marking of Official Number.*—The Secretary of Commerce has been authorized to provide a system of numbering all documented vessels. An application for such number must be made through the Collector of Customs by the master or owner. Each vessel so numbered must have her number "deeply carved or otherwise permanently marked on her mainbeam," preceded by the abbreviation "No."

Prior to 1866 the penalty for the violation of this requirement was the severe one of forfeiting her status as a vessel of the United States. To-day the penalty is a fine of \$30 upon every arrival of the vessel in a port.

4. *Marking of Official Tonnage.*—The law also requires that the net tonnage of a vessel shall be deeply carved or otherwise permanently marked on her mainbeam. This tonnage—representing the entire cubic contents of the interior of the vessel, excluding the spaces occupied by the crew and the propelling machinery, and known as the "registry tonnage" or "register tonnage"—is defined by elaborate provisions of a law passed in 1864, which has been several times amended. It is fixed in the first instance by the surveyor or other officer measuring the boat.

5. *Marking of Name and Home Port.*—The law requires that the name of the vessel shall be marked upon each bow and upon the stern, and that the home port shall also be marked upon the stern. These names may be painted or gilded, or they may consist of cast or carved Roman letters in a dark color on a light ground, or in a light color on a dark ground, secure in place, distinctly visible, and not less in size than four inches. Originally the names of vessels were required to be in white on a black ground. In 1875 yellow and gilt letters were permitted. The rule as we now have it dates from

1891. The penalty for violation of this law is \$10 for each name which is omitted.

In addition to this, every steam vessel of the United States is required to have her name conspicuously placed in distinct, plain letters not less than six inches high, on each outer side of the pilot house, and in case the vessel is a side-wheeler, then also upon the outer side of each wheel-house. "Double-enders" may place the names on the parts corresponding to the bow and stern; and on vessels whose sterns do not allow sufficient space for lettering, the letters may be placed on adjacent parts so as to conform as closely as possible to the requirements, and provided always that the home port shall be marked at *one* end of the vessel.

Scows, barges and other vessels with square bows may be marked on the bow instead of the side, where such marking would be speedily worn out by chafing against other vessels.

The "home port" as required to be marked on the stern of the vessel, may mean either the *port* where the vessel is documented, *or* the place in the *same* district where the vessel was *built*, *or* where one or more of the *owners* *reside*. From this it follows that the home port need not be the port of documentation, for, as already noted, the law is that the vessel must be *registered* in the district which includes the port to which the vessel at that time *belongs*, such port being defined by law as that at or nearest to which the owner, or if there be more than one, the managing owner of the vessel, usually resides.

Questions as to what is a vessel's "home port" frequently arise in connection with contracts for repairs and supplies and liens arising from the same. As will be seen the port of registry and the home port may often be quite different places.

6. *Evidence that Number, Tonnage, Name and Home Port are Properly Marked.*—The Surveyor's Certificate under the form now in use should have covered all of these various points. However, if for any reason they have not been so covered, as for instance, if the vessel is out of the district in which she is being documented, the law requires that evidence be produced by the owner that all these requirements have been complied with. Thus, if the vessel is elsewhere, the owner may make an affidavit that the necessary has been done, but as soon as the vessel arrives within the vessel's home district, where the inspection certificate of a customs officer can be secured, such a certificate must be produced.

7. *Owner's Oath.*—Before a vessel can be documented, the owner, or an officer or agent of the owner, whether individual or corporate, must make an affidavit disclosing the general facts as to the ownership of the boat, giving the names of its various owners, their proportions of ownership, and the citizenship of each of them, etc. It must also include a statement as to the name and tonnage of the vessel, and the place and nature of her construction. This oath is an

absolute requirement, and if the vessel is documented without it, the document is void, and the vessel is not entitled to be considered a vessel of the United States.

It is also required that the owner's affidavit shall name the master of the vessel together with a statement that the master is a citizen, with a note of the means whereby he acquired his citizenship. The person thus named by the owner is thereby deemed her master for all legal purposes, regardless of the question of his competency, or as to who actually commands the vessel, but no name of a master who has not the necessary license to command a vessel of the class in question will be accepted by the Collector. Thus, while in the case of a *barge* any citizen may be *named* as the master, or one citizen may be named as master for any number of barges, in case of a tug or larger vessel requiring a licensed master, the person named as master must be licensed and qualified to perform this duty. This, however, is entirely irrespective of whether he has in fact assumed or does in fact assume actual command over the vessel. For such purposes the command may be a nominal one.

The importance of this document is illustrated by the fact that the penalty for a statement knowingly false is a forfeiture of the vessel, or of its value, to be recovered from the person by whom the oath was made.

8. *Master's Oath.*—In addition to the oath of the owner as to the name and qualification of the master, it is specifically required that if the master is within the district where the registry is made at the time of application for it, an oath must be taken by *him*, instead of by the owner, covering his citizenship. In the case of a false oath by the master the vessel is not forfeited, but the master is liable to a penalty of \$1,000. Every change of master must be reported at the first port and indorsed on the document.

9. *Special Oath by a Corporation.*—Under recent legislation a special oath is required in the case of corporations, covering any question of a possible foreign interest in the corporation. This oath must set forth "that the controlling interest in the said company free from any alien trust or fiduciary obligation, or any understanding that it may be exercised directly or indirectly on behalf of any alien, is owned by citizens of the United States, and that the President and Managing Directors are citizens of the United States and that the corporation is organized under the laws of some particular State.

10. *Evidence of Outstanding Certificate of Inspection.*—It is specifically forbidden to issue a ship's document on any vessel subject to the inspection laws until a copy of the certificate of inspection as issued by the Local Inspectors, has been filed with the Collector of Customs. If the original certificate is not available, a certified copy can always be secured from the office of the proper Collector of Customs.

Bill of Sale Not Required on Original Documentation.—The foregoing completes the steps or documents necessary for the original registration of a vessel.

It will be observed that no reference has been made to a bill of sale. This is because no such bill is required by law to be produced at the first registration. In fact the only bill of sale recognized by statute is a bill which *itself* contains a copy of the ship's document, and therefore such a bill could not be produced before the registration had actually taken place. All that is required in the first instance, therefore, is the Carpenter's Certificate with the affidavits as to ownership, etc. These documents are taken as establishing the ownership, and laying the foundation for registry in a particular name. However, the bill of sale may be actually in existence, having been given either by the builder himself or by some one who had subsequently acquired title to the vessel before her documentation. In such case the bill of sale should be produced to complete the chain of title, and will be retained at the Custom House with the Carpenter's Certificate as a link in the chain. But it will not be recorded, for the law makes no provision for the recording of bills of sale except in the sense of transfers of documented vessels, as hereafter referred to.

Surrender and Reissue of Documents.—The foregoing summarizes the steps to be followed in the case of an *original* registration. But on every change in the status of the vessel a new registry must be secured, and the vessel must be documented anew. This is the case where a vessel is *sold* in whole or in part to a citizen of the United States, or where it is *altered* in whole or in part, by being rebuilt or lengthened or built upon, or is changed from one classification or denomination to another, by alteration in its mode or method of rigging or fitting. It also applies to the case of a change of name as hereafter referred to, and, in case of corporations, to the death of the officer in whose name vessel is documented.

It should be borne in mind that the penalty for failure to effect such a new registration is the severe one that the vessel shall cease to be considered a vessel of the United States. No time limit for the accruing of this penalty, however, has been fixed by law.

In case of such new registration the process is the same as above outlined, but omitting the earlier steps relative to the measurement and marking of vessel, official number, etc., all of which are certified to by the previous document.

In the case of the *sale* of the vessel, it is of course the bill of sale that furnishes the foundation for the transaction, which must be accompanied by the owner's and master's oaths as already outlined.

The bill of sale, as the all-important and indispensable document, must be made to comply strictly with the requirements covering registry, the most important of which is that it will recite at length the last previous certificate issued to the vessel. This proviso is of great importance in England. The inaccurate recital of such a certificate voids the sale entirely. In the United States the penalty is

not so severe, but still severe enough, as the ship is deprived of her American character.

The bill of sale when produced is recorded in the office of the Collector of Customs in accordance with the law hereinafter referred to, and is returned to the owner producing it, as in the case of any other bill of sale which the owner may desire to have recorded.

It frequently happens that it becomes necessary to secure new documents for a vessel which is distant from the port where her new owners reside, and where it is desired that she shall be documented. In such case it is often impractical at the time to secure the outstanding papers for surrender. The practice is to secure certified copies of the same either from the office of the Collector where they were issued or from the office of the Commissioner of Navigation at Washington, giving the necessary oath for the production of the original documents when they come to hand.

It also frequently happens that the certified copies, or indeed sometimes the original documents themselves, do not bear upon their face, as they should, a notation as to the date of expiration of the certificate of inspection of the vessel. In this case some evidence of an outstanding inspection must be produced to the Collector. The simplest plan is to secure, by wire if necessary, a statement from the appropriate Collector of Customs that such an inspection is outstanding.

The law is very strict on the surrender of the old documents upon the issuing of new ones, as also in those cases where a ship loses her right to continue as a vessel of the United States. The old law, passed in 1792, provided for the giving of a bond by the ship's husband or the acting or managing owner, varying in amount according to the tonnage of the boat from \$400 to \$2,000, guaranteeing that the registry should be used only for the vessel for which it was granted, and should not be sold, lent or otherwise disposed of, and that in case the vessel were lost or taken by an enemy or otherwise prevented from returning to the port, the certificate, if preserved, should be delivered up within eight days of her return to port, etc. The present law substitutes for this bond a penalty of \$500 and declares the Certificate of Registry to be void after a violation of any of the requirements as to its surrender.

It frequently happens that a document is lost or wrongfully withheld from the possession of the owner. In this case, upon the oath of the master or other person having charge of the vessel, a new document may be issued either temporary in form, if the vessel is out of her own port, or permanent, if she is in her own port.

II. RECORDING OF BILLS OF SALE

The present law on the subject of recording bills of sale is included in the general mortgage provisions of the new Merchant Marine Act, under which it is provided that no sale of a vessel shall be valid

against a ship unless the bill of sale is recorded by the Collector of Customs in an official register, which is required to show

- (1) The name of the vessel;
- (2) The names of the parties to the sale;
- (3) The time and date of receiving the bill of sale; and
- (4) The interest in the vessel so sold.

It is also provided that no bill of sale can be recorded unless the interest of the grantor in the vessel is stated, also the interest sold, nor unless the bill has been acknowledged before a notary public or other officer authorized to take acknowledgements. In the case of a change in the port of documentation, no bill of sale may be recorded at the new port unless a certified copy of the record of the vessel at the former port is furnished by the collector of that port.

III. PREFERRED MORTGAGES UNDER MERCHANT MARINE ACT

The law in regard to ship mortgages is highly technical and reference only will be made here to the general provisions of the Merchant Marine Act which makes far-reaching changes in the existing system in an effort to give added value to mortgage security on a ship, a form of security which heretofore has been of very limited value on account of the subordination of the mortgage, which is not a maritime contract, to all maritime liens, whether arising out of contract or tort.

The present law gives to a duly recorded preferred mortgage priority except as to (1) liens arising prior to the recording of a mortgage in strict conformity to the provisions of the act; (2) liens for damages arising out of tort; (3) liens for wages of stevedores when employed directly by the owner, operator, master, ship's husband or agent of the vessel; (4) liens for wages of the crew of the vessel; (5) liens for general average; (6) liens for salvage, including contract salvage; and (7) court costs and expenses.

If a mortgage covers a ship of over 200 gross tons the material facts regarding it must be endorsed on the ship's papers. There must also be filed an affidavit that the mortgage was made in good faith, without the intent to delay or defraud. It must appear that the mortgagee is a citizen of the United States and that the mortgage does not stipulate that the mortgagee waives its preferred status. If the mortgage includes property other than a vessel it must provide for the separate discharge of such property by the payment of a specified amount, and if it includes more than one vessel it must similarly provide for the separate discharge of each vessel on the payment of a specified amount, in default of which, the court, in a suit on the mortgage, is to determine the proportionate charge.

Two certified copies of every preferred mortgage are to be delivered by the collector to the mortgagor, who is required to use due diligence to retain one copy on board the vessel, and to cause it and the ship's documents to be exhibited by the master to any person

having business with the vessel which may give rise to a maritime lien or to the sale of the vessel. Upon request, the master is required to exhibit to such person the ship's documents and this copy of the mortgage. Upon request of the mortgagee, the mortgagor is required to disclose in writing, before the execution of any preferred mortgage, the existence of any maritime lien prior to the mortgage, that is known to the mortgagor, and, without the consent of the mortgagee, the mortgagor is forbidden, after the execution of the mortgage and before the mortgagee has had reasonable time to record the mortgage and have the necessary endorsements made, to incur any obligations creating liens on the vessel other than those for wages, for general average or for salvage.

The law permits the preferred mortgage to bear any rate of interest agreed to by the parties. It provides severe penalties upon the master for failing to exhibit the ship's documents or the copy of the mortgage, when demanded, and permits local inspectors to suspend or cancel the master's license for any such violation. As to the mortgagor who fails to make disclosure of liens already referred to, or who incurs new liens with attempt to defraud, the law provides a maximum fine of \$1,000 and imprisonment for two years, and makes the mortgage then immediately payable. It also subjects the collectors of customs and the mortgagor to personal liability for loss occasioned by their failure to perform their duties under the act and opens the federal courts to such suits.

Under the same act jurisdiction of all suits to foreclose a preferred mortgage is vested exclusively in the District Courts of the United States. Authority is also given to bring suit *in personam* in the admiralty, in the United States District Courts, against the mortgagor.

The surrender of the documents of mortgaged vessels without the approval of the Shipping Board is prohibited, and the Board is directed to withhold such approval unless the mortgagee consents to the surrender. By resolution of the Board this law is interpreted as not applying to cases in which owners merely renew licenses or change documents incident to change of trade and where the ownership remains the same.

Elaborate provisions are also to be found covering the formal procedure in case of sales of mortgaged vessels, together with a provision that no rights under a mortgage shall be assigned to any person not a citizen of the United States without the approval of the Board, and that no vessel shall be sold in a suit in the admiralty to any person who is not a citizen.

The legality of the provisions conferring upon the federal courts the right to enforce mortgage liens which are of a nonmaritime character, is much debated and must await final decision by the Supreme Court. If the court should decide against the legality of these provisions serious and difficult questions will be presented as to whether the act as it now stands will be effective to give preferred

status to such a mortgage, under the radically different procedure which must then be resorted to.

The act also revises the law on the subject of the creation of maritime liens for necessities. It provides that persons furnishing repairs, supplies, towage, etc., on order of the owner or an authorized agent shall have a maritime lien on the vessel without being required to prove the credit was given to the vessel; defines the persons who are to be presumed to have authority from the owner to procure repairs, etc., including the agents of a charterer; and permits the waiving of such liens by those furnishing the supplies or services, subject to certain existing specified rules of law.

IV. CHANGE OF NAME

The American law has always been very strict in regard to changing the names of vessels. Such change can only be made by the Commissioner of Navigation, and if made by the master or owner or agent of the vessel subjects the vessel to forfeiture. Since 1881 the Secretary of the Treasury, and later, the Commissioner of Navigation, has been authorized to permit the change of names of vessels "duly enrolled and found seaworthy and free from debt." Under this law it became necessary to secure a special act of Congress, which was frequently done, to change the name of a mortgaged vessel. To cure this defect the law of February 19, 1920, which took effect thirty days after its passage, provides for a change of name by the Commissioner of Navigation upon compliance with regulations issued by him.

All that is required in the first instance is a duplicate application by the owner, addressed to the Commissioner of Navigation and forwarded to him through the Collector of Customs at the home port of the vessel, which is required to state the change desired, the reasons in support of it, place of build, official number, rig, gross tonnage, and the owner's name. It must also include a detailed list of liens of record from all custom houses where the vessel has been previously documented, together with the consent in writing of the mortgagee or other beneficiary under each lien to the change desired. To this the Collector of Customs, forwarding the application, must add his certificate as to liens on record in his office, and must also state the date and place of last inspection, a requirement which presupposes the presentation to him of satisfactory evidence of the vessel's inspection, that is, either the original certificate, or a certified copy of it, or a statement from the office of the Commissioner of Navigation at Washington that such a certificate is outstanding. In the case of vessels not usually inspected, as, for instance, barges, inspectors are authorized to make special examinations at the owner's expense and to furnish a certificate of the seaworthiness of the vessel, the object of course being to prevent old and unseaworthy vessels from concealing their condition and antiquity by a change of name.

After the application has been passed by the Commissioner and permission has been granted, it is required that the change shall be published in a daily or weekly paper nearest to the port of documentation in at least four consecutive issues, the cost of procuring the evidence and of publication to be paid by the applicant. The permission for change is not effective until this fee is paid. Upon its payment the issuance of a new document is then required, which presupposes the production, as in other cases, of the owner's affidavit, and of the master's affidavit, as already explained.

The Collector thereupon records the change of name in his prescribed reports and the transaction is completed.

Vessels formerly documented and which have been sold to the United States and resold to citizens, must be documented under the old name and official number, but vessels never before documented and sold by the United States to citizens, may be redocumented under any name selected that is approved by the commissioner.

In forwarding the application for change of name the Collector of Customs is required to submit his recommendations giving any reasons for or against the change. The usual reasons in support of a change are a desire on the part of the company to carry out some established policy in the naming of its vessels, or a desire to shorten or lengthen a name, as the case may be.

The fee required is prescribed by law upon a sliding scale from \$10 to \$100, according to gross tonnage, the former figure being for vessels of 99 gross tons and under, and the latter for vessels of 5,000 gross tons and over.

V. ENTRY AND CLEARANCE

Whether or not a vessel is required to enter and clear depends, first, upon whether she is registered, and second, upon her tonnage and the service in which she is engaged.

All vessels under *registry* (as distinguished from vessels enrolled or licensed) are required to enter and clear at every port, except when bound from a point in one state to that of an *adjoining* state.

If *not* registered the question depends in the first instance upon the size of the vessel. The law, as inherited from the early days, when smuggling was frequent in small vessels, and it was considered important to keep them under close supervision, makes a distinction between vessels under twenty tons and those above that tonnage.

If *under* 20 tons (and properly documented, that is licensed) and laden wholly with American goods, or with foreign goods in packages as imported not exceeding \$400 in value, or of aggregate value not over \$800, they may trade from a customs district in one state to a customs district in the same or an adjoining state, without entering or clearing. But if *over* twenty tons, such vessels are permitted to trade, without entering or clearing, from one customs district in the same Great District to another in the same Great District, or

from a State in one Great District to an adjoining State in another Great District: Except as thus provided *all* vessels engaged in the coasting trade must enter and clear on their arrival at, or departure from, each port.

The five Great Districts referred to have been defined as follows and should not be confused with the customs collection districts:—

1. Atlantic coast from Canada to Mexico.
2. Porto Rico.
3. Pacific Coast.
4. Alaska.
5. Hawaii.

It is worth noting, however, that enrolled vessels which are not *required* to enter and clear *may* do so, if they desire for any purpose to have a record of their entrance and their clearance. This might occur in the case of a vessel intending to undergo extensive repairs and which might desire such a record to secure a rebate of insurance premium.

In the case of vessels in the foreign trade or coming from one Great District into another, and which are required to be registered, the law requires the surrender and filing of manifests, bill of health and crew list. When these formalities have been complied with, the vessel is posted in the Custom House as entered. The manifest is produced to the boarding officer and includes the original manifest issued at the foreign port as well as a certified copy. The crew list is the list issued by the Collector of the last port of clearance from the United States, the Collector having retained the original sworn to by the master, and having furnished the master with a certified copy. Bills of health should have been secured from the American consular office at the last port of touch, but bills are not required from ports where there is no such officer. The ship's register is deposited in the Custom House and obtained before clearance.

In the case of the clearance of a vessel in the coastwise trade, and which is under registry, or which for any other reason desires a clearance, the master is required to produce a coasting manifest to the Collector. Upon making affidavit to this document the necessary coastwise clearance and permit is issued. If, however, as in the case of tugs, there is no cargo to be manifested, a coastwise permit is issued upon affidavit by the master that the vessel contains no cargo whatever other than sea stores.

In the case of vessels bound to foreign ports the documents take the form of the customary foreign manifest, which is followed by the official clearance in the form familiar to the export trade for a hundred years.

VI. SHIPPING ARTICLES

Shipping articles are required in both the foreign and in the coastwise trade, but with certain important differences.

In the *foreign* trade the articles, which must be in government form, are required to be signed before a Shipping Commissioner. This, however, does not apply to trade between the United States and the British North American possessions and the West Indies, and Mexico. The nature of these articles is sufficiently familiar to require no comment. Generally speaking the articles must contain the following particulars:—

1. The nature and, as far as practicable, the duration of the intended voyage or engagement, and the port or country at which the voyage is to be terminated.
2. The number and description of the crew, specifying their respective employments.
3. The time at which each seaman is to be on board to begin work.
4. The capacity in which each seaman is to serve.
5. The amount of wages which each seaman is to receive.
6. A scale of the provisions which are to be furnished each seaman.
7. Any regulations as to conduct on board and as to fines, short allowances of provisions, or other lawful punishments for misconduct, which may be sanctioned by Congress or authorized by the Secretary of Commerce, not contrary to or not otherwise provided for by law, which the parties agree to adopt.
8. Any stipulations in reference to allotment of wages or other matters not contrary to law. In 1898 this provision was repealed so far as it relates to allotments in trade between the United States, Dominion of Canada, Newfoundland, the West Indies and Mexico, and the coasting trade of the United States, except between Atlantic and Pacific ports.

In the *coasting* trade the law merely requires that every *master* of a vessel of fifty tons or over, bound from a port in one State to a port in any other than a port in an adjoining State (with the exception of voyages from the Atlantic to Pacific ports, which are included under foreign trade) shall make an *agreement in writing* with his seamen declaring the voyage or term of time for which the seaman is shipped. This agreement *may* be signed before a Shipping Commissioner, but this is not compulsory. The agreement required in the coasting trade requires only the voyage, or term of time for which the seaman is shipped.

Question has been raised as to whether the requirement as to written articles applies to cases where the "adjoining State" is reached by a waterway running through other States, as, for instance, a voyage from New York to Philadelphia. It seems clear, however, that the law should be strictly interpreted, according to its terms, and that articles would not be required on such a voyage.

In neither case does the law provide a limit in the matter of length of voyage. In England shipping articles are frequently for long periods of a year or more. Our practice is more limited. Clauses for one or more continuous voyages are commonly found

with a provision for the termination of the contract by authority of the master, or any member of the crew, upon twenty-four hours' notice.

A provision of law which sometimes occasions difficulty is that which permits a seaman discharged "without fault on his part justifying such discharge" and without his consent, before the commencement of the voyage or before one month's wages are earned, to receive a compensation of one month's wages. This question, like all other questions relating to wages, comes up in the first instance before a Shipping Commissioner, and in the hands of a competent commissioner there should seldom be any difficulty in determining whether the discharge was or was not due to the fault of the seaman or to his inability properly to perform his duties.

The right to overtime is not provided for by statute, and before the war was not generally recognized. In July, 1919, however, an informal agreement was made between the Shipping Board and the steamship association and the unions, under which this right to claim overtime is recognized, provided it is covered by special contract.

VII. LICENSING AND QUALIFICATIONS OF OFFICERS

The law requires that masters, chief mates, second and third mates, if in charge of a watch, engineers, and pilots of all steam vessels, and the masters of sailing vessels of over 700 gross tons, and of other vessels over 100 gross tons carrying passengers for hire, shall be licensed and classified by the boards of local inspectors, and imposes a penalty of \$100 for employing an unlicensed officer or for an unlicensed person to serve as an officer. These several boards of inspectors are under the direction of a Supervising Inspector General appointed by the President, and who is at the head of a Steamboat Inspection Service, and are further under the supervision of ten supervising inspectors, to each of whom is assigned general supervision of the work of inspection in a particular district. The law imposes large discretion upon the local inspectors in the examination and licensing of officers, limiting the licenses to a period of five years, and giving the inspectors authority to suspend licenses on proof of bad conduct, intemperate habits, incapacity, inattention to duties or a willful violation of inspection laws.

It is specially forbidden for any state or municipal government to impose on pilots any obligation to secure a license in addition to that issued by the Federal government.

One of the most important functions of the local inspectors is that which concerns the investigation of collisions and complaints of incompetency or misconduct committed by licensed officers. For this purpose the inspectors have power to summon the witnesses, to administer oaths and, upon hearing had after reasonable notice in writing to the alleged delinquent, to suspend or to revoke his license, if satisfied that he has been guilty of misbehavior, negligence or un-

skillfulness, or has endangered life. Appeals from the decision of the local inspectors may be made to the supervising inspector.

Where, however, the supervising or local inspector finds a licensed officer on board a vessel under the influence of liquor to such an extent as to unfit him for duty, or when a licensed officer uses abusive language to an officer or insults him while on duty, the local inspector is required to revoke the license of the offending officer without further trial or investigation.

The rules of the board classify vessels according to the general character of their trade, as

1. Ocean and coastwise.
2. Lakes, bays and sounds.
3. Rivers.

Qualifications for the officers properly vary according to these three classes of service, to which is added a number of other special classifications, as, for instance, ferry steamers on rivers, passenger barges on rivers, etc.; or in the case of engineers, as, for instance, condensing river steamer and noncondensing river steamer. These requirements are set forth in full detail in the Regulations of the Steamboat Inspection Service, with which all officers should be familiar.

Certain minimum requirements in the case of deck officers have been prescribed by statute, the latest law being that of March 11, 1918, which with certain minor exceptions, provides for one licensed master for every vessel; for vessels 1,000 gross tons or over, three licensed mates, and for vessels between 200 and 1,000 tons, two licensed mates; for vessels between 100 and 200 tons, one licensed mate. The inspectors, however, are permitted to increase these requirements if they consider the vessel not sufficiently manned for safe navigation.

The same law of 1918 prohibits officers from assuming deck watches on leaving port unless they have had at least six hours off duty within the twelve hours preceding sailing; and also prohibits licensed officers on both ocean and coastwise vessels from doing duty exceeding nine hours of any twenty-four while in port, or more than twelve hours of any twenty-four while at sea, except in case of emergency endangering life or property.

VIII. QUALIFICATIONS OF SEAMEN

Before the passage of the Seamen's Act in 1915, there were no statutory requirements as to the ability or experience of the crew, other than the general requirement that the vessel should be properly manned. This act, however, presents a body of highly stringent requirements. Its principal requirements may be summarized as follows:

Age.—In the matter of age the act provides that in the deck department of all vessels of more than 100 tons gross, except those navigating rivers exclusively and the smaller inland lakes, there shall be a certain proportion of seamen with the rating of able seamen, a classification which is limited to those of nineteen years of age. The lack of supply of able seamen has made it practically impossible to enforce this requirement.

Service and Physical Qualification.—The act requires the physical examination of able seamen in the deck department. It also divides able seamen into two classes, those engaged in vessels operating on the high seas and those engaged on the Great Lakes, smaller lakes, bays and sounds. For the former three years' service at sea or on the Great Lakes, etc., and an examination as to general physical condition, is required, or one year's experience on deck at sea or on the Great Lakes, etc., together with an oral examination on seamanship and for the latter eighteen months' experience at sea or on the Lakes.

Lifeboat Men.—The Seamen's Act, in connection with its elaborate provisions for the equipment of vessels with lifesaving appliances, lays down the distribution of a specially designated class of certificated seamen known as lifeboat men to the various lifeboats and rafts required to be carried by a vessel, leaving the designation of the individuals to the discretion of the master. To secure a certificate as lifeboat man, a seaman is required to prove to the satisfaction of the inspection officers, or other officers designated for the purpose of issuing certificates, that he has been trained in all the operations in connection with launching lifeboats and the use of oars, is acquainted with the practical handling of the boats themselves, and is capable of understanding and answering the orders relative to lifeboat service.

Language.—Perhaps the most disputed proviso of the Seamen's Act is that which requires that not less than 75 per cent. of the crew of the vessel must be able to understand any order given by the officer—that is, the necessary orders given to the members of the crew in each department in the performance of their particular duties. This law, however, does not require the use of any particular language on the part of officers and crew of the vessel, nor does it require an English-speaking crew, nor that the members of the crew in one department of the vessel should understand orders given in another department.

IX. NATIONALITY OF OFFICERS AND CREW

Officers.—Since 1792 our laws have required that the officers of all vessels of the United States who are in charge of a watch, including pilots, shall be citizens. This of course includes tugs, barges and all other vessels which are documented under our laws. The term "officer" includes the Chief Engineer and each Assistant Engineer in charge of the watch. The only exception to this rule is that which was made by the Ship Registry Act of 1914, and the executive order based upon it, under which foreign-built ships admitted to

American registry under that act are permitted to retain their watch officers, without regard to citizenship, for a term of seven years, provided that after two years any vacancy must be filled by a citizen of the United States.

Crew.—There are no provisions or restrictions as to the nationality of the crew on vessels of the United States.

X. WAGES

The Seamen's Act requires that on *coasting* voyages, wages shall be paid to every seaman within two days after the termination of the agreement under which he shipped, or at the time of his discharge if he should be discharged before the expiration of the agreement; and that on *foreign* voyages wages shall be paid within twenty-four hours after the discharge of the cargo, or within four days after the discharge of the seaman, whichever shall first happen. The law further provides that a seaman is entitled in every case to be paid at the time of his discharge a sum equal to one-third of the balance of wages then due him. This proviso, however, is seldom observed in practice, nor is it insisted upon, as it would in general be impracticable for wages to be paid at the moment of discharge.

The question of payment of a certain portion of wages on demand, which is also covered by the Seamen's Act and earlier acts, has received considerable revision in the Merchant Marine Act. Under this law it is provided that *every* seaman on a vessel of the United States may receive on demand of the master one-half of the balance of his wages earned at every port where the vessel loads or delivers cargo. This protection may not be waived by contract, but is subject to the proviso that the demand shall not be made before the expiration of, nor oftener than once in, five days, nor more than once in the same harbor. Failure on the part of the master to comply with this demand releases the seaman from his contract and entitles him to full payment of wages earned. At the end of the voyage the seaman is entitled to the remainder of his wages according to the provisions of the Seamen's Act, which also provides that notwithstanding the release, which is required to be signed before the Shipping Commissioner at the time of the seaman's discharge, the proper court may set aside the release upon good cause shown. The provision of the Merchant Marine Act is specially made applicable to the case of seamen on foreign vessels while in the harbors of the United States, and the courts of the United States are opened to such seamen for its enforcement.

Advances.—The law in regard to advances to seamen is also slightly amended by the Merchant Marine Act, which makes it unlawful to pay wages in advance of the time when actually earned, or to pay such advance wages or make any order or note or other evidence of indebtedness for the same to any other person, or to pay any other person for the shipment of seamen when payment is

deducted or is to be deducted from the seaman's wages. Payment of such advance wages or allotment whether made within or without the United States does not absolve the vessel from libel and is no defense to a libel suit. This act also forbids any person to demand or receive from any seaman any remuneration whatever for providing him employment.

Seamen discharged by a consul in a foreign port on account of the voyage being continued contrary to agreement, or unseaworthiness of vessel, or bad provisions, or cruel treatment, are entitled to one month's extra wages and transportation to the United States. Seamen discharged at a foreign port at the request of the master, and not on account of neglect of duty, are entitled to employment on a vessel agreed to by the seaman and to one month's extra wages.

Seamen discharged before commencement of voyage without fault, are entitled to one month's additional wages, and all seamen are entitled to two days' extra wages for each day's delay in payment at end of voyage.

The laws also contain elaborate and beneficial provisions for the recovery of their wages by seamen through proceedings in the courts.

Seamen are disqualified by law from signing away their lien upon a vessel for wages; as also their rights to participate in salvage. It is to be noted that the seaman's right to a share in salvage, in the case of the saving of human life, on the part of a seaman who has taken part in the services rendered, is expressly conferred and protected by statute. Failure, unless unavoidable, to give help to persons at sea, in danger of being lost, is also made a serious criminal offense.

XI. WATCH AND WATCH AND WORK-DAY

Before the passage of the Seamen's Act there were no legal requirements as to hours of labor at sea, though long established custom had divided the deck crew into two watches and the engine crew into three watches, with certain variations in this plan in special trades. Under the Seamen's Act it is now provided that on merchant vessels of over 100 tons, except those engaged in river and harbor navigation, the sailors must be divided into at least two watches, and the firemen, oilers and water tenders into at least three watches, which are to be kept on duty successively for the performance of ordinary work, incident to the sailing and management of the vessel.

Seamen may not be shipped to work alternately in the fireroom and on deck, nor may those shipped to work on deck be shifted to the fireroom, or vice versa, subject to cases of emergency, in the judgment of the master or other officer. These provisions, however, do not prohibit the master or other officers from requiring the whole or any part of the crew to participate in fire, lifeboat and other

drills when the vessel is in a safe harbor nine hours, inclusive of the anchor watch, which is a legal day, but in such case no seaman may be required to do unnecessary work on Sundays or on New Year's, Fourth of July, Labor Day, Thanksgiving Day and Christmas, provided that this does not prevent the dispatch of the vessel on regular schedule or when ready to proceed on her voyage.

XII. PROVISIONS FOR CREW

Sleeping Quarters.—The Seamen's Act provides that on all vessels (except yachts, pilot boats and vessels of less than 100 tons) whose construction is thereafter begun, there shall be a crew space of not more than 100 cubic feet or not less than 16 square feet for each seaman lodged therein; also that each seaman shall have a separate berth, and that not more than one berth shall be placed above another; that the seamen's quarters shall be properly lighted, drained, heated, ventilated, constructed and protected and shut off; and that crew space shall be kept free from goods and stores. This law increased the crew quarters from 72 cubic feet and 12 square feet in the case of steamships, and from 100 cubic feet in the case of sailing vessels. It is noted that the Seamen's Act applies to *all* merchant vessels of the United States, in this respect differing from the earlier acts which applied only to seagoing vessels.

Washing Places.—The Seamen's Act requires that all merchant vessels whose construction is begun after its passage, having more than ten men on deck, shall have a light, clean and properly ventilated washing place, at least one washing outfit for every two men of the watch, and a separate washing place for the fire-room and engine-room men, if more than ten in number, which shall be large enough to accommodate at least one-sixth of them at the same time, and shall have hot and cold water supply and a sufficient number of wash basins, sinks and shower baths.

Provisions Scale.—Since 1790 the laws of the United States have specified a scale of provisions required to be carried upon vessels. With minor alterations included in the Seamen's Act, the present scale, with permissible substitutions, was fixed by law on December 21, 1898. Under this law seamen have the option of accepting the provisions offered or of demanding the legal scale, which is required to be inserted in all ship articles and to be posted in the galley and forecastle. The laws contain provisos for complaints to be made to the officer in command of the vessel or to the United States consular officer or Shipping Commissioner or chief officer of the customs, who has authority to take action to see that the deficiency is corrected, subject to a penalty for default.

For allowing the supply of provisions to be reduced below the legal scale during the voyage, except for unavoidable causes, compensation must be paid to every seaman according to the time of its continuance and in accordance with the scheduled allowances fixed by law.

Hospital Accommodations.—In addition to crew space already referred to all merchant vessels which ordinarily make voyages of more than three days' duration and carry a crew of twelve or more seamen, are required to have a separate compartment for hospital purposes with at least one bunk for every twelve seamen, provided that not more than six bunks in all may be required.

Warm Room and Woolen Clothing.—Every vessel bound on a voyage over fourteen days in length must, in addition to a slop chest, provide for each seaman one suit of woolen clothing, as also a "safe and warm room" for cold weather.

XIII. PERSONAL INJURIES TO SEAMEN AND RECOVERIES FOR DEATH

Prior to the passage of the recent Merchant Marine Act (1920) recovery by a seaman for injuries received by him in the service of the ship was subject to the maritime law under which (except in case of the unseaworthiness of the vessel, where full recovery might be claimed) the seaman was entitled to, but only to, his maintenance and cure, and to wages so long at least as the voyage continued, regardless of his own negligence (unless it amounted to willful misconduct) or of that of any other person. Where his contract extended beyond the voyage or there was fault on the part of the ship, recovery of wages was allowable even beyond the termination of the voyage.

This liability could not be enlarged or diminished by any law of the states on the subject of employer's liability or workmen's compensation.

The Seamen's Act of 1915 undertook to enlarge the protection of seamen by providing that in suits to recover damages for injuries received on board a vessel, or in its service, seamen "having command," *e. g.*, masters, etc., should not be held to be fellow servants with those under their authority, but this was held not to affect those cases covered by the general rule of the maritime law, above stated, under which the fellow servant question is immaterial.

A more successful effort at extending the seaman's right, however, was made in the recent Merchant Marine Act, which permits any seaman who suffers injury in the course of his employment, to maintain, at his election, an action for damages at law, with the right of trial by jury, and in such case to have the benefit of the United States statutes modifying or extending the rights of railroad employees in analogous cases.

The same act also covers the question of actions for the death of seamen, giving to their personal representatives the right to sue for damages at law and the benefit of a trial by jury, and the similar benefit of the laws covering actions for death in the case of railroad employees.

This provision, it is observed, is in sharp contrast, and perhaps in some conflict with the provision of an act passed at the same session of Congress, on March 30, 1920, giving a general right to maintain

actions for all deaths occurring on the high seas by some wrongful act or neglect. This law, which in its broad terms covers also the case of seamen, permits suits to be brought in the admiralty courts and fixes the recovery at the amount of pecuniary loss sustained by the persons for whose benefit suit is brought. It further provides that in such action the fact that the decedent has been guilty of contributory negligence is not to be considered a bar to recovery, but is to be taken into consideration by the court in fixing the degree of negligence and in reducing the recovery accordingly.

A discussion of the technical questions involved in the relations of these two acts is beyond the scope of this summary.

XIV. OFFENSES BY SEAMEN

Offenses by seamen are punishable under the laws of the United States, generally, when committed on the high seas, or on any waters within the jurisdiction of the admiralty courts, or on lands under the exclusive jurisdiction of the United States. The list of crimes covers those familiar to the criminal law, such as murder, manslaughter, assault, rape, robbery, arson, larceny, forgery, receiving stolen property, etc. Other offenses peculiar to marine life may be noted as follows.

Mutiny, Desertion and Disobedience.—Inciting to or participation in a mutiny on a United States vessel is punished by a fine of not over \$1,000 or imprisonment of not over five years or both. This offense includes the stirring up of the crew to resist lawful orders or "to refuse or neglect their proper duty, or to betray their proper trust," also "the assembly with others in a tumultuous and mutinous manner." The actual revolt or mutiny—the usurping of the command of a vessel, is punishable by a fine of not over \$2,000 or imprisonment of not over ten years, or both.

Willful disobedience is punishable under the Seamen's Act by being placed in irons until the disobedience ceases, and, on arrival in port, by forfeiture of wages, not exceeding four days' pay, or, at the discretion of the court, by imprisonment not exceeding a month.

Continued willful disobedience subjects the offender to being placed in irons on bread and water, with full rations every fifth day, until the disobedience ceases, and the forfeiture, on arrival in port, of twelve days' pay for every twenty-four hours' disobedience, or by imprisonment not over three months, at the discretion of the court.

Desertion is punishable under the Seamen's Act by forfeiture of clothes and effects left on the vessel, and of wages due, the former penalty of imprisonment for desertion in a foreign port having been abolished, as also the provision for the arrest of seamen deserting from foreign vessels. This proviso is much more lenient than the laws of most foreign countries. In the case of England, if the desertion takes place outside the United Kingdom the deserter is liable

to imprisonment for a period not exceeding twelve weeks. Imprisonment for desertion in the coastwise trade was abolished by the Maguire Act in 1895.

Miscellaneous Offenses.—Among these may be mentioned the following:

Seduction of a female passenger, by master, officer, crew or employee is punishable by a fine not exceeding \$1,000 and imprisonment not exceeding one year, or both. A subsequent marriage may be pleaded in bar of conviction. *Misconduct*, neglect or inattention to duty, resulting in loss of life, is punishable by fine not exceeding \$10,000, or imprisonment not more than ten years, or both. *Abandonment of seamen* is punishable by a fine not over \$500, or imprisonment not over six months, or both. *Barratry*—the attempt to injure or destroy a vessel for her insurance—is punishable by a fine not over \$10,000 and imprisonment not over ten years. *Wrecking*—plundering or stealing from a wrecked vessel—calls for a fine not exceeding \$5,000 and imprisonment not exceeding ten years. *Willfully Obstructing Escape* from a wrecked vessel subjects the offender to a minimum imprisonment of ten years, with a maximum punishment of imprisonment for life. *Plundering a vessel*,—fine \$5,000 maximum, and imprisonment not exceeding ten years. *Entering a vessel with intent to commit felony*,—fine \$10,000 maximum, and imprisonment not exceeding five years. *Casting away or otherwise destroying vessel by owner*,—imprisonment for life or any lesser term; by other person, imprisonment not exceeding ten years.

The carrying of sheath-knives by seamen in the merchant service is forbidden, and penalties for allowing violation of this prohibition are imposed upon the master.

Officers, seamen and employees are forbidden to visit passengers' quarters except by permission of the master. Severe penalties are imposed upon both the offending person and upon the master permitting the violation.

Corporal punishment is prohibited by the Seamen's Act under penalties not only of fine and imprisonment, but of liability to civil damages.

Ill treatment of a seaman, beating without justifiable cause, wounding or beating, or the withholding of suitable food and nourishment, or the infliction of any cruel and unusual punishment is punished by fine of not over \$1,000 or imprisonment of not over five years.

Shanghaiing was prohibited, under severe penalties, in 1909.

Assistance in Case of Collision.—The law requires every master, in the case of a collision, so far as he can do so without serious danger to his own vessel or its crew or passengers, to stand by the other vessel until he has ascertained that she has no need of further assistance, and to render such assistance as may be practical, also to give the name of his own vessel, her port of registry, and other material information. For failure to do so and in the absence of reasonable cause shown for such failure, a collision, in the absence of

proof to the contrary, is deemed to have been caused by such master's wrongful act or neglect.

For failing to render such assistance, or giving the information required, masters are liable to a fine of \$1,000 or a year's imprisonment, and the vessel is expressly made liable for the amount named, one-half of which is payable to the informer.

XV. RULES OF THE ROAD

There are three general bodies of rules covering the navigation of vessels with respect to the rules of the road.

The first of these are the International Rules which were adopted at a conference of maritime nations held in the United States in 1889, which are now in force in practically all maritime countries. They apply only to vessels on the high seas, the boundary line of which, so far as the United States is concerned, has been defined by an act of Congress passed in 1913, under which the Secretary of Commerce, having been authorized to fix lines separating the high seas from inland waters for the purposes of the rules of the road, has defined a water line from Cutler Harbor, Maine, to Puget Sound.

The second body of rules is known as the Inland Rules, embodied in a federal statute passed in 1897, and applicable only to the waters within the line thus defined. These rules, generally speaking, are similar to the International Rules but differ in a number of details.

The third body of rules is what is known as the Pilot Rules for certain inland waters of the Atlantic and Pacific coasts and of the coast of the Gulf of Mexico, adopted by the supervising inspectors of the Steamboat Inspection Service, approved by the Secretary of Commerce under authority of the Act of June, 1897, establishing the Inland Rules, and of subsequent acts passed in 1903 and 1913, establishing the Department of Commerce. These rules are also to a large extent similar to, and are generally in harmony with the inland rules, to which they yield in case of conflict. More extended reference to these rules, the knowledge of which should be a matter of second nature to seafaring men, is beyond the scope of this summary.

XVI. PILOTAGE

As the states had enacted pilotage laws before the adoption of the Constitution, the right of the states to a certain measure of control over pilotage, within their boundaries, has always been recognized, and consequently a dual system has grown up. The state laws are effective except where the subject is specifically covered by a federal law.

As to the federal requirements, all vessels engaged in the *coasting* trade are required, when under way and within the jurisdiction of the United States, that is, except on the high seas, to be piloted by officers duly licensed under the federal law as pilots for the particular waters covered. This is covered by the qualifications laid down for

the various classes of vessels by the Board of Supervising Inspectors, and by the provision of our law that the qualifications necessary for obtaining a license as master, mate or pilot of all steam vessels shall be as prescribed by the Board.

Registered steam vessels, when engaged in *foreign* trade, and all sailing vessels of the United States in the foreign or coasting trade, are exempt from this requirement, but are subject to the requirements of the pilotage laws of the several states.

The master of a foreign vessel is not required to employ a pilot licensed under the laws of the United States.

As to state laws, the pilotage of all vessels in state waters (except enrolled steam vessels employed in the coasting trade, which are exempted from state supervision by act of Congress), is regulated by the laws of the respective states. There are, however, a number of special prohibitions designed to prevent controversy between the states. Thus, no regulation may be adopted by one state making the discrimination of a lower pilotage as to vessels sailing between ports of one state and vessels sailing between ports of different states, nor any discrimination against steam vessels; nor may a state require pilots to procure a state license in addition to that issued by the United States. It is to be noted that the federal law, which forbids the states to require enrolled coastwise steamers to take on state pilots, does not apply to *sailing vessels* even though they may be in a tow of a steam tug carrying a licensed pilot, a discrimination difficult to justify.

In this connection, thrifty ship agents handling *registered* vessels which for the time being happen to be engaged in the *coasting* trade, will naturally see to it that registers are exchanged for enrollments, wherever a substantial saving in the matter of exemption from state pilotage fees can be figured out.

It is to be noted, however, that in order to permit this very saving, in another direction, the government permits vessels engaged in trade through the canal to be enrolled and licensed. By thus obviating the necessity for registry, state pilotage is avoided.

XVII. LENGTH OF HAWSERS

The law provides a special procedure covering length of hawsers in the case of tows. The Commissioner of Lighthouses, the Supervising Inspector of the Steamboat Inspection Service, and the Commissioner of Navigation are directed to convene as a board, under directions of the Secretary of Commerce, and to prepare regulations limiting the length of hawsers between towing vessels and seagoing barges in tow, and the length of such tows within any of the inland waters of the United States. Willful violation of these regulations subjects the license of the master of the towing vessel to suspension or revocation.

XVIII. INSPECTION OF STEAM VESSELS

All steam vessels must be inspected yearly as to their hulls, and generally as to whether they have complied with all the requirements of the law in regard to fires, boats, pumps, hose, life preservers, floats, anchors, etc., as laid down in the Rules and Regulations of the United States Board of Supervising Inspectors, which should be familiar to all masters. Inspectors, however, have the widest latitude. The law requires that they shall satisfy themselves that the boat is in a condition to warrant their belief that she may be used in navigation with safety for life. In making this test they may have her put under way or may adopt any other suitable means to test her sufficiency or that of her equipment. This yearly inspection, however, may be suspended under special regulations, when vessels are laid up and dismantled and out of commission. In this connection it is perhaps worth remembering that the laws of the United States make it a criminal offense for any person knowingly to send to sea an American ship, whether in the coast, foreign or coastwise trade, in such an unseaworthy state that the life of any person is liable to be endangered. The punishment for this offense is properly severe — imprisonment not exceeding five years or a fine not exceeding \$1,000 or both at the discretion of the court.

The law also provides for the yearly inspection of the boilers of all steam vessels, including tug-boats, to insure compliance with the requirements of the standards issued by the board.

Barges.—Seagoing barges of over 100 tons gross are also subject to yearly inspection. The standard applied by the local inspectors is the elastic one that they shall satisfy themselves that the barge is "of a structure suitable for the service in which she is to be employed, has suitable accommodations for the crew, and is in a condition to warrant the belief that she may be used in navigation with safety to life." In the case of such barges the law also specially provides that there shall be at least one lifeboat, one anchor with suitable chain or cable, and at least one life preserver for each person on board.

Without such certificate of inspection actually in force at the time, no document can be issued for a barge, and for navigating a barge without a certificate or without the equipment referred to the owner is liable to a penalty of \$500. Certificates of inspection for barges are issued in the same manner as for seagoing vessels generally. Where the certificate is not available at the time of securing a new document, evidence that it is still in force must be produced to the Collector, which may be in the form of a telegraphic confirmation of the fact, from the office of the Steamboat Inspection Bureau, Department of Commerce, Washington.

The Certificate of Inspection.—Upon the making of every inspection, if the inspectors refuse to grant a certificate, they are required to sign a written statement of their reasons for their disapproval.

If approval is granted, however, it is their duty to immediately deliver to the master or owner a temporary certificate, which is good until the regular certificate has been delivered. Copies of these certificates are kept on file in the inspector's office or in the office of the Collector of Customs. The original is required to be posted in a conspicuous place in the vessel, to be kept there at all times except where it is otherwise permitted in special cases under the regulations.

Manning of Inspected Vessels.—The inspection of the local inspectors covers not only the hull and boiler and equipment, but also the questions of manning, character of merchandise to be carried, and the mode of packing dangerous articles, etc.

The local inspectors, on making the general inspection of the vessel, are required to make entry in the certificate of inspection of such complement of licensed officers and crew, including certificated life-boat men, as they consider necessary for her safety, this entry being subject to right of appeal to the Supervising Inspector General.

Where such a vessel is for any reason deprived of the services of any number of the crew, without the consent or fault of the master or any person interested in the vessel, she is permitted to proceed on her voyage if, in the judgment of the master, she is still sufficiently manned. It is required, however, that the master shall ship, if obtainable, a number equal to those whose services he has been deprived of, and of the same or higher grade, also that he shall explain in writing the situation to the local inspectors within twelve hours of the arrival of the vessel at its destination under penalty of \$50. The penalty for undermanning the vessel is \$100, or in case of an insufficient number of licensed officers \$500.

XIX. REGISTER TONNAGE

Three methods of measuring the capacity of a ship are more or less in general use in the maritime world.

The displacement tonnage, or weight of the volume of water displaced by the ship when fully loaded with all her crew, coal, supplies, etc., is in general use by the navies of the world for assuring accuracy and uniformity, but of course is not adapted to merchant vessels on which the cargo varies from voyage to voyage.

The deadweight tonnage, or actual weight of the cargo which a merchant ship will transport, obviously is adaptable only for vessels carrying bulk cargoes and not for general cargo ships. Each of these measurements is recorded in long tons avoirdupois.

The American registered tonnage system follows the Moorsom rules adopted in England in 1854, which are now in effect in practically every maritime country. It aims to express the entire cubical content of a merchant ship in unit tons of 100 cubic feet, this figure having been arrived at in England, on the adoption of the present system, when it was found that the ratio of the total registered tonnage of the British merchant marine to cubic feet of contents was slightly over 98.

The measurement rules of the United States are carefully and elaborately defined in the statutes themselves.

Under the statutes net tonnage is ascertained by deducting from gross tonnage that proportion of the ship's space occupied by engine's machinery, boilers, coal bunkers and certain other minor spaces, such as those which inclose the steering gear below deck, the boatman's stores, chart-houses, donkey engine and sail room.

To encourage the building of ample forecastles, crews' quarters, etc., as well as for other reasons, the rule is adopted by almost all maritime nations that tonnage taxes and other tonnage dues shall be collected not on gross but upon the net tonnage. This also includes the usual commercial charges for towage, dockage and wharfage. Official U. S. statistics of entrances and clearances are in terms of net-register tonnage, as also time charter rates when not specifically based on dead-weight tonnage. The incentive to understate net register is thus strong.

In the case of tugs engaged in foreign service and which are therefore subject to tonnage duties, it becomes important to see that the net tonnage, which should ordinarily be a very small figure, is held to the lowest limit. For instance, seagoing and oceangoing tugs have been reported with a tonnage as low as eight and ten tons. On the other hand, many American tugs of no larger capacity are in the habit of carrying a net tonnage far exceeding this amount.

XX. TONNAGE TAXES

Tonnage tax is levied on every vessel engaged in trade upon her arrival by sea from a foreign port unless she is in distress. It is not levied on more than five entries at the same rate during any one year nor on vessels arriving otherwise than by sea from foreign ports at which equivalent taxes or dues are not imposed on vessels of the United States.

This tax varies from two to six cents per net ton, the two cent rate applying to ports in North and Central America, the West Indies, including Cuba and the Bermuda Islands, the coast of South America bordering on the Caribbean Sea, and New Foundland. By special treaty arrangement it also applies to Norway and Sweden. The six cent rate applies to all other trade.

Vessels entering otherwise than by sea from a foreign port at which tonnage or lighthouse dues or other equivalent tax or taxes are not imposed on vessels of the United States, are exempt from the tonnage duty of two cents per ton, not to exceed in the aggregate ten cents per ton in any one year.

These tonnage duties are substantially similar to the corresponding English rates, but are materially lower than corresponding charges in European continental ports. There are a number of special instances of exceptional cases, but which are not of sufficient frequency or importance to deserve special mention. It is well to remember,

however, that if any officer of an American vessel should happen not to be a citizen a penalty of fifty cents a ton is imposed, except as provided by presidential proclamation in the case of certain vessels of foreign origin.

Foreign steam tugs employed in towing coastwise vessels are liable to a tonnage of fifty cents a ton on the measurement of the vessel towed, unless the towing is done in whole, or in part, within or upon foreign waters, or when the tug-boat is owned by a foreign railway company whose cars enter into the United States by means of such transportation.

XXI. NAVIGATION FEES

Vessels engaged in foreign trade with other than Canadian ports are subject to navigation fees upon entry. Thus if she is less than 100 tons burden the fee is \$1.50. Over that amount the fee is \$2.50. Her clearance fee is at the same rate.

In the event that she might have any dutiable merchandise on board she would also be liable under similar conditions to the usual fees for surveyor's services in connection with her customs entries, to wit, \$1.50, if less than 100 tons, and \$3 if more than 100 tons. Where she carries no dutiable merchandise, however, the fee is a nominal one of sixty-seven cents, which applies, of course, in the case of foreign ballast which is not dutiable.

XXII. ANNUAL LIST OF MERCHANT VESSELS

The law provides that the Commissioner of Navigation shall publish annually a list of vessels of the United States belonging to the commercial marine, specifying their official number, signal letters, name, rig, tonnage, home port, and place and date of build, distinguishing sailing vessels from those propelled by steam or other motive power. The list for the year 1919 was the fifty-first list so published.

Under the provisions of an act passed in 1912 it is required that upon affidavit by a reputable ship builder as to the rebuilding of *unrigged* wooden vessels, giving date and place of their rebuilding, and certifying that they are sound and free from rotten wood and in every respect seaworthy, a notation to this effect shall be included in the list. It is noted that the provision applies only to *unrigged* wooden vessels, and thus does not cover the case of rigged barges, whatever their size.

XXIII. NUMBERING OF UNDOCUMENTED MOTOR BOATS

In 1918 a law was passed requiring the numbering of all theretofore undocumented motor boats, except vessels under sixteen feet temporarily equipped with detachable motors. These numbers are awarded by the collectors of customs on application of the owner or

master, and are required to be painted, or otherwise attached, to the bow of the vessel, and to be not less than three inches in size. Violation of the act is subject to a penalty of \$10.

From the date of the passage of the act on December 7, 1917, up to July 1, 1919, nearly 100,000 such vessels had been numbered, and the experiment had proved highly successful in assisting the enforcement of the navigation laws and the collection of taxes as well as the enforcement of harbor police laws and regulations.

XXIV. ADMINISTRATION OF NAVIGATION LAWS

Practically every department of the government has to do with some feature or other of the navigation laws as affecting ship building, maritime commerce and ocean transportation. Primarily, however, the administration of the laws is in the hands of the Department of Commerce, under the immediate direction of the Bureau of Navigation, the Steamboat Inspection Service and the United States Shipping Commissioners. Other branches of government service whose functions touch on some phase of navigation are the Public Health Service, with its hospitals and quarantine stations, and the Coast Guard which, since 1915, has included the Revenue Cutter and Life Saving Service. The War and Navy departments also have various functions related primarily to the national defense. The activities of the Shipping Board will be separately reviewed.

Commissioner of Navigation.—The Bureau of Navigation, under the head of the Commissioner of Navigation, has general superintendence of the merchant marine and seamen so far as they are not directly subject to other departments; it controls the documentation of vessels and has supervision of the laws relating to measurement of vessels, signal numbers and the questions relating to the tonnage tax. It is charged further with the preparation of the annual list of vessels belonging to the merchant marine, has authority to change the names of vessels, and is charged with the preparation of annual reports to the Secretary, and with numerous other miscellaneous but important duties.

Steamboat Inspection Service.—The Steamboat Inspection Service is under the direction of a Supervising Inspector General appointed by the President, in addition to which there are ten supervising inspectors who meet as a Board in Washington at least once a year and establish regulations necessary to carry out the inspection laws relating to vessels, subject to the right of the Secretary of Commerce to convene a special executive committee, composed of the Supervising Inspector General and two supervising inspectors, who have power to alter and amend these rules with the approval of the secretary.

The principal duty of the supervising inspectors is to supervise the work of a large number of local inspectors of hulls and of boilers, and who in their respective districts, upon designation of the Secretary

of Commerce, constitute the Board of Local Inspectors charged with the duties of inspection and the issuance and supervision of licenses already referred to.

Shipping Commissioners.—The Shipping Commissioners of the United States form a highly responsible body of officers with semi-judicial functions, who are directly responsible to the Secretary of Commerce, by whom they are appointed. The law provides one such officer for each port of entry which is a port of ocean navigation, and which in the judgment of the Secretary shall require the services of a Commissioner, and for whom Congress has made an appropriation. Generally speaking, the duties of the Shipping Commissioner are to afford facilities for engaging seamen; to superintend their engagement and discharge in the manner prescribed by law; to provide means for securing their presence on the board at the proper time; to facilitate the making of apprentices in the sea service; and to perform other duties imposed upon them.

One of the most important and useful functions of a Shipping Commissioner, particularly when the office is in capable hands, is that of arbitrating claims between master, consignee, agent or owner or any of the crew, when both parties agree in writing to submit to the award, it being provided by law that an award made by a Commissioner in such case is binding on both parties and in any legal proceedings is to be deemed conclusive of the rights of the party.

The Commissioners are given authority to call upon owners, agents, masters, for proof or production of books, papers, etc., or to give evidence before the Commissioner subject to a penalty and punishment for contempt for failure to so comply.

As it is the practice to insert arbitration clauses in all steamers' shipping articles, excepting those operated by the Shipping Board, which should be carefully read to the crews before they are signed, this duty is generally viewed by captains and owners as an invaluable aid to shipping and has been accepted also by the majority of seamen. The work of the Commissioners in this direction has been so successful that an effort was recently made to confer upon the Commissioners by law certain magisterial powers subject to appeal to the United States District Courts. So far the effort has been unsuccessful.

Having in mind their responsibilities and enormous possibilities of service to navigation, Shipping Commissioners are among the most pitifully underpaid of government officials. As an illustration of this it may be noted that the Commissioners in the great ports of Philadelphia and of Norfolk receive salaries of \$2,400 and of \$1,800, respectively.

XXV. THE SHIPPING BOARD

The United States Shipping Board was created before the war, by the Shipping Act of 1916, with the dual function and purpose, first of acting as the administrative agent of the government in developing

the merchant marine and the naval auxiliary in peace time, and, second, that of meeting the shipping problems incident to a possible war.

Its most important powers have heretofore been exercised through the instrumentality of the United States Shipping Board Emergency Fleet Corporation, organized by, and the stock of which has been held by, the Shipping Board, for the Government. The primary function of the Corporation was the construction of vessels, but its work was soon extended to include their operation, in an effort to avoid the embarrassments, prior to our entering the war, of having our vessels, if operated by such purely public administrative agency as the Shipping Board, treated as public vessels in foreign ports. In the beginning it was intended that the Corporation should function in the character of a private corporation, and 50,000,000 dollars was appropriated to it for the construction of vessels, but during the war it acted primarily as the agent of the President, claiming the immunities and privileges incident to that somewhat anomalous relation, and has expended upwards of 3,000,000,000 dollars, its capital remaining intact. The actual operation of vessels by the Corporation has been carried out through the instrumentality of a specially organized Division of Operations, which was largely separate from the Corporation itself, and subject to the direction and supervision of the Shipping Board.

The jurisdiction of the Shipping Board, however, has not been confined to vessels in which the government is interested as owner or charterer. From the first the Board has had authority to enforce a general prohibition against unfair discrimination and preferences and against the improper influencing of marine insurance companies by common carriers by water, whether in foreign or interstate commerce, not including tramps, and has also exercised the right of supervising and regulating tariffs fixed by common carriers in *inter-state* commerce. In this field, however, the jurisdiction of the Board does not overlap the jurisdiction of the Interstate Commerce Commission, which has authority to establish through routes and joint rates where they involve water transportation. Like the Interstate Commerce Commission the orders of the Shipping Board are subject to review by the federal courts.

A recent provision of the Merchant Marine Act (1920) reorganizes and strengthens the Shipping Board, consolidating and centralizing its control and giving it wide powers in the matter of developing the American merchant marine and of encouraging the establishment of new lines and the investigation generally of all matters relative to the advancement of merchant marine.

Among other new powers of general scope given to the Board is that under which it is authorized to make rules and regulations affecting shipping in the *foreign* trade, wherever necessary, in order to meet special conditions in foreign trade arising out of foreign laws or competitive methods practiced in foreign countries. The Board is also authorized to request the heads of departments to sus-

pend and modify regulations or to make new regulations affecting shipping in the foreign trade, except those relating to the Public Health Service, the Consular Service and the Steamboat Inspection Service, and no rules or regulations excepting those affecting the services named, may be established by any department without being first submitted to the Board for its approval and final action taken thereon by the Board or the President.

APPENDIX II

THE MERCHANT MARINE ACT OF 1920¹

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by the citizens of the United States; and it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and, in so far as may not be inconsistent with the express provisions of this Act, the United States Shipping Board shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained.

SEC. 2. (a) That the following Acts and parts of Acts are hereby repealed, subject to the limitations and exceptions hereinafter, in this Act, provided:

(1) The emergency shipping fund provisions of the Act entitled "An Act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June 30, 1917, and for other purposes," approved June 15, 1917, as amended by the Act entitled "An Act to amend the emergency shipping fund provisions of the Urgent Deficiency Appropriation Act, approved June 15, 1917, so as to empower the President and his designated agents to take over certain transportation systems for the transportation of shipyard and plant employees, and for other purposes," approved April 22, 1918, and as further amended by the Act entitled "An Act making appropriation to supply deficiencies in appropriations for the fiscal year ending June 30, 1919, and prior fiscal years, on account of war expenses, and for other purposes," approved November 4, 1918;

(2) Section 3 of such Act of April 22, 1918;

¹ Public, No. 261, 66th Congress.

An Act to provide for the promotion and maintenance of the American merchant marine, to repeal certain emergency legislation, and provide for the disposition, regulation, and use of property acquired thereunder, and for other purposes.

(3) The paragraphs numbered 2 and 3 under the heading "Emergency shipping fund" in such Act of November 4, 1918; and

(4) The Act entitled "An Act to confer on the President power to prescribe charter rates and freight rates and to requisition vessels, and for other purposes," approved July 18, 1918.

(5) Sections 5, 7, and 8, Shipping Act, 1916.

(b) The repeal of such Acts or parts of Acts is subject to the following limitations:

(1) All contracts or agreements lawfully entered into before the passage of this Act under any such Act or part of Act shall be assumed and carried out by the United States Shipping Board, herein after called "the board."

(2) All rights, interests, or remedies accruing or to accrue as a result of any such contract or agreement or of any action taken in pursuance of any such Act or parts of Acts shall be in all respects as valid, and may be exercised and enforced in like manner, subject to the provisions of subdivision (c) of this section, as if this Act had not been passed.

(3) The repeal shall not have the effect of extinguishing any penalty incurred under such Acts or parts of Acts, but such Acts or parts of Acts shall remain in force for the purpose of sustaining a prosecution for enforcement of the penalty therein provided for the violation thereof.

(4) The board shall have full power and authority to complete or conclude any construction work begun in accordance with the provisions of such Acts or parts of Acts if, in the opinion of the board, the completion or conclusion thereof is for the best interests of the United States.

(c) As soon as practicable after the passage of this Act the board shall adjust, settle, and liquidate all matters arising out of or incident to the exercise by or through the President of any of the powers or duties conferred or imposed upon the President by any such Act or parts of Acts; and for this purpose the board, instead of the President, shall have and exercise any of such powers and duties relating to the determination and payment of just compensation: *Provided*, That any person dissatisfied with any decision of the board shall have the same right to sue the United States as he would have had if the decision had been made by the President of the United States under the Acts hereby repealed.

SEC. 3. (a) That section 3 of the "Shipping Act, 1916," is amended to read as follows:

"SEC. 3. That a board is hereby created to be known as the United States Shipping Board and hereinafter referred to as the board. The board shall be composed of seven commissioners, to be appointed by the President, by and with the advice and consent of the Senate; and the President shall designate the member to act as chairman of the board, and the board may elect one of its members as vice chairman. Such commissioners shall be appointed as soon as practicable

after the enactment of this Act and shall continue in office two for a term of one year, and the remaining five for terms of two, three, four, five, and six years, respectively, from the date of their appointment, the term of each to be designated by the President, but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he succeeds.

"The commissioners shall be appointed with due regard to their fitness for the efficient discharge of the duties imposed on them by this Act, and two shall be appointed from the States touching the Pacific Ocean, two from the States touching the Atlantic Ocean, one from the States touching the Gulf of Mexico, one from the States touching the Great Lakes and one from the interior, but not more than one shall be appointed from the same State. Not more than four of the commissioners shall be appointed from the same political party. A vacancy in the board shall be filled in the same manner as the original appointments. No commissioner shall take any part in the consideration or decision of any claim or particular controversy in which he has a pecuniary interest.

"Each commissioner shall devote his time to the duties of his office, and shall not be in the employ of or hold any official relation to any common carrier or other person subject to this Act, nor while holding such office acquire any stock or bonds thereof or become pecuniarily interested in any such carrier.

"The duties of the board may be so divided that under its supervision the directorship of various activities may be assigned to one or more commissioners. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the board shall not impair the right of the remaining members of the board to exercise all its powers. The board shall have an official seal, which shall be judicially noticed.

"The board may adopt rules and regulations in regard to its procedure and the conduct of its business. The board may employ within the limits of appropriations made therefor by Congress such attorneys as it finds necessary for proper legal service to the board in the conduct of its work, or for proper representation of the public interest in investigations made by it or proceedings pending before it whether at the board's own instance or upon complaint, or to appear for or represent the board in any case in court or other tribunal. The board shall have such other rights and perform such other duties not inconsistent with the Merchant Marine Act, 1920, as are conferred by existing law upon the board in existence at the time this section as amended takes effect.

"The commissioners in office at the time this section as amended takes effect shall hold office until all the commissioners provided for in this section as amended are appointed and qualify."

(b) The first sentence of section 4 of the "Shipping Act, 1916," is amended to read as follows:

"SEC. 4. That each member of the board shall receive a salary of \$12,000 per annum."

SEC. 4. That all vessels and other property or interests of whatsoever kind, including vessels or property in course of construction or contracted for, acquired by the President through any agencies whatsoever in pursuance of authority conferred by the Acts or parts of Acts repealed by section 2 of this Act, or in pursuance of the joint resolution entitled "Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes," approved May 12, 1917, with the exception of vessels and property the use of which is in the opinion of the President required by any other branch of the Government service of the United States, are hereby transferred to the board: *Provided*, That all vessels in the military and naval service of the United States, including the vessels assigned to river and harbor work, inland waterways, or vessels for such needs in the course of construction or under contract by the War Department, shall be exempt from the provisions of this Act.

SEC. 5. That in order to accomplish the declared purposes of this Act, and to carry out the policy declared in section 1 hereof, the board is authorized and directed to sell, as soon as practicable, consistent with good business methods and the objects and purposes to be attained by this Act, at public or private competitive sale after appraisement and due advertisement, to persons who are citizens of the United States except as provided in section 6 of this Act, all of the vessels referred to in section 4 of this Act or otherwise acquired by the board. Such sale shall be made at such prices and on such terms and conditions as the board may prescribe, but the completion of the payment of the purchase price and interest shall not be deferred more than fifteen years after the making of the contract of sale. The board in fixing or accepting the sale price of such vessels shall take into consideration the prevailing domestic and foreign market price of, the available supply of, and the demand for vessels, existing freight rates and prospects of their maintenance, the cost of constructing vessels of similar types under prevailing conditions, as well as the cost of the construction or purchase price of the vessels to be sold, and any other facts or conditions that would influence a prudent, solvent business man in the sale of similar vessels or property which he is not forced to sell. All sales made under the authority of this Act shall be subject to the limitations and restrictions of section 9 of the "Shipping Act, 1916," as amended.

SEC. 6. That the board is authorized and empowered to sell to aliens, at such prices and on such terms and conditions as it may determine, not inconsistent with the provisions of section 5 (except that completion of the payment of the purchase price and interest

shall not be deferred more than ten years after the making of the contract of sale), such vessels as it shall, after careful investigation, deem unnecessary to the promotion and maintenance of an efficient American merchant marine; but no such sale shall be made unless the board, after diligent effort, has been unable to sell, in accordance with the terms and conditions of section 5, such vessels to persons citizens of the United States, and has, upon an affirmative vote of not less than five of its members, spread upon the minutes of the board, determined to make such sale; and it shall make as a part of its records a full statement of its reasons for making such sale. Deferred payments of purchase price of vessels under this section shall bear interest at the rate of not less than $5\frac{1}{2}$ per centum per annum, payable semiannually.

SEC. 7. That the board is authorized and directed to investigate and determine as promptly as possible after the enactment of this Act and from time to time thereafter what steamship lines should be established and put in operation from ports in the United States or any Territory, District, or possession thereof to such world and domestic markets as in its judgment are desirable for the promotion, development, expansion, and maintenance of the foreign and coast-wise trade of the United States and an adequate postal service, and to determine the type, size, speed, and other requirements of the vessels to be employed upon such lines and the frequency and regularity of their sailings, with a view to furnishing adequate, regular, certain, and permanent service. The board is authorized to sell, and if a satisfactory sale can not be made, to charter such of the vessels referred to in section 4 of this Act or otherwise acquired by the board, as will meet these requirements to responsible persons who are citizens of the United States who agree to establish and maintain such lines upon such terms of payment and other conditions as the board may deem just and necessary to secure and maintain the service desired; and if any such steamship line is deemed desirable and necessary, and if no such citizen can be secured to supply such service by the purchase or charter of vessels on terms satisfactory to the board, the board shall operate vessels on such line until the business is developed so that such vessels may be sold on satisfactory terms and the service maintained, or unless it shall appear within a reasonable time that such line can not be made self-sustaining. The Postmaster General is authorized, notwithstanding the Act entitled "An Act to provide for ocean mail service between the United States and foreign ports, and to promote commerce," approved March 3, 1891, to contract for the carrying of the mails over such lines at such price as may be agreed upon by the board and the Postmaster General: *Provided*, That preference in the sale or assignment of vessels for operation on such steamship lines shall be given to persons who are citizens of the United States who have the support, financial and otherwise, of the domestic communities primarily interested in such lines if the board is satisfied of the ability of such persons to main-

tain the service desired and proposed to be maintained, or to persons who are citizens of the United States who may then be maintaining a service from the port of the United States to or in the general direction of the world market port to which the board has determined that such service should be established: *Provided further*, That where steamship lines and regular service have been established and are being maintained by ships of the board at the time of the enactment of this Act, such lines and service shall be maintained by the board until, in the opinion of the board, the maintenance thereof is unbusinesslike and against the public interests: *And provided further*, That whenever the board shall determine, as provided in this Act, that trade conditions warrant the establishment of a service or additional service under Government administration where a service is already being given by persons, citizens of the United States, the rates and charges for such Government service shall not be less than the cost thereof, including a proper interest and depreciation charge on the value of Government vessels and equipment employed therein.

SEC. 8. That it shall be the duty of the board, in coöperation with the Secretary of War, with the object of promoting, encouraging, and developing ports and transportation facilities in connection with water commerce over which it has jurisdiction, to investigate territorial regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water and highway and the natural direction of the flow of commerce; to investigate the causes of the congestion of commerce at ports and the remedies applicable thereto; to investigate the subject of water terminals, including the necessary docks, warehouses, apparatus, equipment, and appliances in connection therewith, with a view to devising and suggesting the types most appropriate for different locations and for the most expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail; to advise with communities regarding the appropriate location and plan of construction of wharves, piers, and water terminals; to investigate the practicability and advantages of harbor, river, and port improvements in connection with foreign and coastwise trade; and to investigate any other matter that may tend to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports: *Provided*, That if after such investigation the board shall be of the opinion that rates, charges, rules, or regulations of common carriers by rail subject to the jurisdiction of the Interstate Commerce Commission are detrimental to the declared object of this section, or that new rates, charges, rules, or regulations, new or additional port terminal facilities, or affirmative action on the part of such common carriers by rail is necessary to promote the objects of this section, the board may submit its findings to the Interstate Commerce Commission for such action as such commission may consider proper under existing law.

SEC. 9. That if the terms and conditions of any sale of a vessel

made under the provisions of this Act include deferred payments of the purchase price, the board shall require, as part of such terms and conditions, that the purchaser of the vessel shall keep the same insured (a) against loss or damage by fire, and against marine risks and disasters, and war and other risks if the board so specifies, with such insurance companies, associations or underwriters, and under such forms of policies, and to such an amount, as the board may prescribe or approve; and (b) by protection and indemnity insurance with such insurance companies, associations, or underwriters and under such forms of policies, and to such an amount as the board may prescribe or approve. The insurance required to be carried under this section shall be made payable to the board and/or to the parties as interest may appear. The board is authorized to enter into any agreement that it deems wise in respect to the payment and/or the guarantee of premiums of insurance.

SEC. 10. That the board may create out of net revenue from operations and sales, and maintain and administer, a separate insurance fund, which it may use to insure in whole or in part, against all hazards commonly covered by insurance policies in such cases, any interest of the United States (1) in any vessel, either constructed or in process of construction, and (2) in any plants or materials heretofore or hereafter acquired by the board or hereby transferred to the board.

SEC. 11. That during a period of five years from the enactment of this Act the board may annually set aside out of the revenues from sales and operations a sum not exceeding \$25,000,000, to be known as its construction loan fund, to be used in aid of the construction of vessels of the best and most efficient type for the establishment and maintenance of service on steamship lines deemed desirable and necessary by the board, and such vessels shall be equipped with the most modern, the most efficient and the most economical machinery and commercial appliances. The board shall use such fund to the extent required upon such terms as the board may prescribe to aid persons, citizens of the United States, in the construction by them in private shipyards in the United States of the foregoing class of vessels. No aid shall be for a greater sum than two-thirds of the cost of the vessel or vessels to be constructed, and the board shall require such security, including a first lien upon the entire interest in the vessel or vessels so constructed as it shall deem necessary to insure the repayment of such sum with interest thereon and the maintenance of the service for which such vessel or vessels are built.

SEC. 12. That all vessels may be reconditioned and kept in suitable repair and until sold shall be managed and operated by the board or chartered or leased by it on such terms and conditions as the board shall deem wise for the promotion and maintenance of an efficient merchant marine, pursuant to the policy and purposes declared in sections 1 and 5 of this Act; and the United States Shipping Board Emergency Fleet Corporation shall continue in existence and have

authority to operate vessels, unless otherwise directed by law, until all vessels are sold in accordance with the provisions of this Act, the provision in section 11 of the "Shipping Act, 1916," to the contrary notwithstanding.

SEC. 13. That the board is further authorized to sell all property other than vessels transferred to it under section 4 upon such terms and conditions as the board may determine and prescribe.

SEC. 14. That the net proceeds derived by the board prior to July 1, 1921, from any activities authorized by this Act, or by the "Shipping Act, 1916," or by the Acts specified in section 2 of this Act, except such an amount as the board shall deem necessary to withhold as operating capital, for the purposes of section 12 hereof, and for the insurance fund authorized in section 10 hereof, and for the construction loan fund authorized in section 11 hereof, shall be covered into the Treasury of the United States to the credit of the board and may be expended by it, within the limits of the amounts heretofore or hereafter authorized, for the construction, requisitioning, or purchasing of vessels. After July 1, 1921, such net proceeds, less such an amount as may be authorized annually by Congress to be withheld as operating capital, and less such sums as may be needed for such insurance and construction loan funds, shall be covered into the Treasury of the United States as miscellaneous receipts. The board shall, as rapidly as it deems advisable, withdraw investment of Government funds made during the emergency under the authority conferred by the Acts or parts of Acts repealed by section 2 of this Act and cover the net proceeds thereof into the Treasury of the United States as miscellaneous receipts.

SEC. 15. That the board shall not require payment from the War Department for the charter hire of vessels owned by the United States Government furnished by the board from July 1, 1918, to June 30, 1919, inclusive, for the use of such department.

SEC. 16. That all authorization to purchase, build, requisition, lease, exchange, or otherwise acquire houses, buildings or land under the Act entitled "An Act to authorize and empower the United States Shipping Board Emergency Fleet Corporation to purchase, lease, requisition, or otherwise acquire, and to sell or otherwise dispose of improved or unimproved lands, houses, buildings, and for other purposes," approved March 1, 1918, is hereby terminated: *Provided, however,* That expenditures may be made under said Act for the repair of houses and buildings already constructed, and the completion of such houses or buildings as have heretofore been contracted for or are under construction, if considered advisable, and the board is authorized and directed to dispose of all such properties or the interest of the United States in all such properties at as early a date as practicable, consistent with good business and the best interests of the United States.

SEC. 17. That the board is authorized and directed to take over on January 1, 1921, the possession and control of, and to maintain and

develop, all docks, piers, warehouses, wharves and terminal equipment and facilities, including all leasehold easements, rights of way, riparian rights and other rights, estates and interests therein or appurtenant thereto, acquired by the President by or under the Act entitled "An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year ending June 30, 1918, and prior fiscal years, on account of war expenses, and for other purposes," approved March 28, 1918.

The possession and control of such other docks, piers, warehouses, wharves and terminal equipment and facilities or parts thereof, including all leasehold easements, rights of way, riparian rights and other rights, estates or interests therein or appurtenant thereto which were acquired by the War Department or the Navy Department for military or naval purposes during the war emergency may be transferred by the President to the board whenever the President deems such transfer to be for the best interests of the United States.

The President may at any time he deems it necessary, by order setting out the need therefor and fixing the period of such need, permit or transfer the possession and control of any part of the property taken over by or transferred to the board under this section to the War Department or the Navy Department for their needs, and when in the opinion of the President such need therefor ceases the possession and control of such property shall revert to the board. None of such property shall be sold except as may be hereafter provided by law.

SEC. 18. That section 9 of the "Shipping Act, 1916," is amended to read as follows:

"SEC. 9. That any vessel purchased, chartered, or leased from the board, by persons who are citizens of the United States, may be registered or enrolled and licensed, or both registered and enrolled and licensed, as a vessel of the United States and entitled to the benefits and privileges appertaining thereto: *Provided*, That foreign-built vessels admitted to American registry or enrollment and license under this Act, and vessels owned by any corporation in which the United States is a stockholder, and vessels sold, leased, or chartered by the board to any person a citizen of the United States, as provided in this Act, may engage in the coastwise trade of the United States while owned, leased, or chartered by such a person.

"Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein.

"It shall be unlawful to sell, transfer or mortgage, or, except under regulations prescribed by the board, to charter, any vessel purchased from the board or documented under the laws of the United

States to any person not a citizen of the United States, or to put the same under a foreign registry or flag, without first obtaining the board's approval.

"Any vessel chartered, sold, transferred or mortgaged to a person not a citizen of the United States or placed under a foreign registry or flag, or operated, in violation of any provision of this section shall be forfeited to the United States, and whoever violates any provision of this section shall be guilty of a misdemeanor and subject to a fine of not more than \$5,000, or to imprisonment for not more than five years, or both."

SEC. 19. (1) The board is authorized and directed in aid of the accomplishment of the purposes of this Act

(a) To make all necessary rules and regulations to carry out the provisions of this Act;

(b) To make rules and regulations affecting shipping in the foreign trade not in conflict with law in order to adjust or meet general or special conditions unfavorable to shipping in the foreign trade, whether in any particular trade or upon any particular route or in commerce generally and which arise out of or result from foreign laws, rules, or regulations or from competitive methods or practices employed by owners, operators, agents, or masters of vessels of a foreign country; and

(c) To request the head of any department, board, bureau, or agency of the Government to suspend, modify, or annul rules or regulations which have been established by such department, board, bureau, or agency, or to make new rules or regulations affecting shipping in the foreign trade other than such rules or regulations relating to the Public Health Service, the Consular Service, and the Steamboat Inspection Service.

(2) No rule or regulation shall hereafter be established by any department, board, bureau, or agency of the Government which affect shipping in the foreign trade, except rules or regulations affecting the Public Health Service, the Consular Service, and the Steamboat Inspection Service, until such rule or regulation has been submitted to the board for its approval and final action has been taken thereon by the board or the President.

(3) Whenever the head of any department, board, bureau, or agency of the Government refuses to suspend, modify, or annul any rule or regulation, or make a new rule or regulation upon request of the board, as provided in subdivision (c) of paragraph (1) of this section, or objects to the decision of the board in respect to the approval of any rule or regulation, as provided in paragraph (2) of this section, either the board or the head of the department, board, bureau, or agency which has established or is attempting to establish the rule or regulation in question may submit the facts to the President, who is hereby authorized to establish or suspend, modify, or annul such rule or regulation.

(4) No rule or regulation shall be established which in any manner

gives vessels owned by the United States any preference or favor over those vessels documented under the laws of the United States and owned by persons who are citizens of the United States.

SEC. 20. (1) That section 14 of the Shipping Act, 1916, as amended, is amended to read as follows:

"SEC. 14. That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country,—

"First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term 'deferred rebate' in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

"Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term 'fighting ship' in this Act means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing or reducing competition by driving another carrier out of said trade.

"Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

"Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

"Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than \$25,000 for each offense."

(2) The Shipping Act, 1916, as amended, is amended by inserting after section 14 a new section to read as follows:

"SEC. 14a. The board upon its own initiative may, or upon complaint shall, after due notice to all parties in interest and hearing, determine whether any person, not a citizen of the United States and engaged in transportation by water of passengers or property —

"(1) Has violated any provision of section 14, or

"(2) Is a party to any combination, agreement, or understanding, express or implied, that involves in respect to transportation of passengers or property between foreign ports, deferred rebates or any other unfair practice designated in section 14, and that excludes from admission upon equal terms with all other parties thereto, a common carrier by water which is a citizen of the United States and which has applied for such admission.

"If the board determines that any such person has violated any such provision or is a party to any such combination, agreement, or understanding, the board shall thereupon certify such fact to the Secretary of Commerce. The Secretary shall thereafter refuse such person the right of entry for any ship owned or operated by him or by any carrier directly or indirectly controlled by him, into any port of the United States, or any Territory, District, or possession thereof, until the board certifies that the violation has ceased or such combination, agreement, or understanding has been terminated."

SEC. 21. That from and after February 1, 1922, the coastwise laws of the United States shall extend to the island Territories and possessions of the United States not now covered thereby, and the board is directed prior to the expiration of such year to have established adequate steamship service at reasonable rates to accommodate the commerce and the passenger travel of said islands and to maintain and operate such service until it can be taken over and operated and maintained upon satisfactory terms by private capital and enterprise: *Provided*, That if adequate shipping service is not established by February 1, 1922, the President shall extend the period herein allowed for the establishment of such service in the case of any island Territory or possession for such time as may be necessary for the establishment of adequate shipping facilities therefor: *Provided further*, That until Congress shall have authorized the registry as vessels of the United States of vessels owned in the Philippine Islands, the Government of the Philippine Islands is hereby authorized to adopt, from time to time, and enforce regulations governing the transportation of merchandise and passengers between ports or places in the Philippine Archipelago: *And provided further*, That the foregoing provisions of this section shall not take effect with reference to the Philippine Islands until the President of the United States after a full investigation of the local needs and conditions shall, by proclamation, declare that an adequate shipping service has been established as herein provided and fix a date for the going into effect of the same.

SEC. 22. That the Act entitled "An Act giving the United States Shipping Board power to suspend present provisions of law and permit vessels of foreign registry and foreign-built vessels admitted to American registry under the Act of August 18, 1914, to engage in the coastwise trade during the present war and for a period of one hundred and twenty days thereafter, except the coastwise trade with Alaska," approved October 6, 1917, is hereby repealed: *Provided*, That all foreign-built vessels admitted to American registry, owned

on February 1, 1920, by persons citizens of the United States, and all foreign-built vessels owned by the United States at the time of the enactment of this Act, when sold and owned by persons citizens of the United States, may engage in the coastwise trade so long as they continue in such ownership, subject to the rules and regulations of such trade: *Provided*, That the board is authorized to issue permits for the carrying of passengers in foreign ships if it deems it necessary so to do, operating between the Territory of Hawaii and the Pacific Coast up to February 1, 1922.

SEC. 23. That the owner of a vessel documented under the laws of the United States and operated in foreign trade shall, for each of the ten taxable years while so operated, beginning with the first taxable year ending after the enactment of this Act, be allowed as a deduction for the purpose of ascertaining his net income subject to the war-profits and excess-profits taxes imposed by Title III of the Revenue Act of 1918 an amount equivalent to the net earnings of such vessel during such taxable year, determined in accordance with rules and regulations to be made by the board: *Provided*, That such owner shall not be entitled to such deduction unless during such taxable year he invested, or set aside under rules and regulations to be made by the board in a trust fund for investment, in the building in shipyards in the United States of new vessels of a type and kind approved by the board, an amount, to be determined by the Secretary of the Treasury and certified by him to the board, equivalent to the war-profits and excess-profits taxes that would have been payable by such owner on account of the net earnings of such vessels but for the deduction allowed under the provisions of this section: *Provided further*, That at least two-thirds of the cost of any vessel constructed under this paragraph shall be paid for out of the ordinary funds or capital of the person having such vessel constructed.

That during the period of ten years from the enactment of this Act any person a citizen of the United States who may sell a vessel documented under the laws of the United States and built prior to January 1, 1914, shall be exempt from all income taxes that would be payable upon any of the proceeds of such sale under Title I, Title II, and Title III of the Revenue Act of 1918 if the entire proceeds thereof shall be invested in the building of new ships in American shipyards, such ships to be documented under the laws of the United States and to be of a type approved by the board.

SEC. 24. That all mails of the United States shipped or carried on vessels shall, if practicable, be shipped or carried on American-built vessels documented under the laws of the United States. No contract hereafter made with the Postmaster General for carrying mails on vessels so built and documented shall be assigned or sublet, and no mails covered by such contract shall be carried on any vessel not so built and documented. No money shall be paid out of the Treasury of the United States on or in relation to any such contract for carrying mails on vessels so built and documented when such contract has

been assigned or sublet or when mails covered by such contract are in violation of the terms thereof carried on any vessel not so built and documented. The board and the Postmaster General, in aid of the development of a merchant marine adequate to provide for the maintenance and expansion of the foreign or coastwise trade of the United States and of a satisfactory postal service in connection therewith, shall from time to time determine the just and reasonable rate of compensation to be paid for such service, and the Postmaster General is hereby authorized to enter into contracts within the limits of appropriations made therefor by Congress to pay for the carrying of such mails in such vessels at such rate. Nothing herein shall be affected by the Act entitled "An Act to provide for ocean mail service between the United States and foreign ports, and to promote commerce," approved March 3, 1891.

SEC. 25. That for the classification of vessels owned by the United States, and for such other purposes in connection therewith as are the proper functions of a classification bureau, all departments, boards, bureaus, and commissions of the Government are hereby directed to recognize the American Bureau of Shipping as their agency so long as the American Bureau of Shipping continues to be maintained as an organization which has no capital stock and pays no dividends: *Provided*, That the Secretary of Commerce and the chairman of the board shall each appoint one representative who shall represent the Government upon the executive committee of the American Bureau of Shipping, and the bureau shall agree that these representatives shall be accepted by them as active members of such committee. Such representatives of the Government shall serve without any compensation, except necessary traveling expenses: *Provided further*, That the official list of merchant vessels published by the Government shall hereafter contain a notation clearly indicating all vessels classed by the American Bureau of Shipping.

SEC. 26. That cargo vessels documented under the laws of the United States may carry not to exceed sixteen persons in addition to the crew between any ports or places in the United States or its Districts, Territories, or possessions, or between any such port or place and any foreign port, or from any foreign port to another foreign port, and such vessels shall not be held to be "passenger vessels" or "vessels carrying passengers" within the meaning of the inspection laws and the rules and regulations thereunder: *Provided*, That nothing herein shall be taken to exempt such vessels from the laws, rules, and regulations respecting life-saving equipment: *Provided further*, That when any such vessel carries persons other than the crew as herein provided for, the owner, agent, or master of the vessel shall first notify such persons of the presence on board of any dangerous articles, as defined by law, or of any other condition or circumstances which would constitute a risk of safety for passenger or crew.

The privilege bestowed by this section on vessels of the United

States shall be extended insofar as the foreign trade is concerned to the cargo vessels of any nation which allows the like privilege to cargo vessels of the United States in trades not restricted to vessels under its own flag.

Failure on the part of the owner, agent, or master of the vessel to give such notice shall subject the vessel to a penalty of \$500, which may be mitigated or remitted by the Secretary of Commerce upon a proper representation of the facts.

SEC. 27. That no merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by sections 18 or 22 of this Act: *Provided*, That this section shall not apply to merchandise transported between points within the continental United States, excluding Alaska, over through routes heretofore or hereafter recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall hereafter be filed with said commission when such routes are in part over Canadian rail lines and their own or other connecting water facilities: *Provided further*, That this section shall not become effective upon the Yukon river until the Alaska Railroad shall be completed and the Shipping Board shall find that proper facilities will be furnished for transportation by persons citizens of the United States for properly handling the traffic.

SEC. 28. That no common carrier shall charge, collect, or receive, for transportation subject to the Interstate Commerce Act of persons or property, under any joint rate, fare, or charge, or under any export, import, or other proportional rate, fare, or charge, which is based in whole, or in part on the fact that the persons or property affected thereby is to be transported to, or has been transported from, any port in a possession or dependency of the United States, or in a foreign country, by a carrier by water in foreign commerce, any lower rate, fare, or charge than that charged, collected, or received by it for the transportation of persons, or of a like kind of property, for the same distance, in the same direction, and over the same route, in connection with commerce wholly within the United States, unless the vessel so transporting such persons or property is, or unless it was at the time of such transportation by water, documented under the laws of the United States. Whenever the board is of the opinion, however, that adequate shipping facilities to or from any port in a possession or dependency of the United States or a foreign country are not afforded by vessels so documented, it shall certify this fact to the Interstate Commerce Commission, and the commission may, by order, suspend the operation of the provisions of this section with

respect to the rates, fares, and charges for the transportation by rail of persons and property transported from, or to be transported, to such ports, for such length of time and under such terms and conditions as it may prescribe in such order, or in any order supplemental thereto. Such suspension of operation of the provisions of this section may be terminated by order of the commission whenever the board is of the opinion that adequate shipping facilities by such vessels to such ports are afforded and shall so certify to the commission.

SEC. 29. (a) That whenever used in this section —

(1) The term "association" means any association, exchange, pool, combination, or other arrangement for concerted action; and

(2) The term "marine insurance companies" means any persons, companies, or associations, authorized to write marine insurance or reinsurance under the laws of the United States or of a State, Territory, District, or possession thereof.

(b) Nothing contained in the "antitrust laws" as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, shall be construed as declaring illegal an association entered into by marine insurance companies for the following purposes: To transact a marine insurance and reinsurance business in the United States and in foreign countries and to reinsure or otherwise apportion among its membership the risks undertaken by such association or any of the component members.

SEC. 30. Subsection A. That this section may be cited as the "Ship Mortgage Act, 1920."

DEFINITIONS.

Subsection B. When used in this section —

(1) The term "document" includes registry and enrollment and license;

(2) The term "documented" means registered or enrolled or licensed under the laws of the United States, whether permanently or temporarily;

(3) The term "port of documentation" means the port at which the vessel is documented, in accordance with law;

(4) The term "vessel of the United States" means any vessel documented under the laws of the United States and such vessel shall be held to continue to be so documented until its documents are surrendered with the approval of the board; and

(5) The term "mortgagee," in the case of a mortgage involving a trust deed and a bond issue thereunder, means the trustee designated in such deed.

RECORDING OF SALES, CONVEYANCES, AND MORTGAGES OF VESSELS OF THE UNITED STATES.

Subsection C. (a) No sale, conveyance, or mortgage which, at the time such sale, conveyance, or mortgage is made, includes a vessel of

the United States, or any portion thereof, as the whole or any part of the property sold, conveyed, or mortgaged shall be valid, in respect to such vessel, against any person other than the grantor or mortgagor, his heir or devisee, and a person having actual notice thereof, until such bill of sale, conveyance, or mortgage is recorded in the office of the collector of customs of the port of documentation of such vessel, as provided in subdivision (b) of this subsection.

(b) Such collector of customs shall record bills of sale, conveyances, and mortgages, delivered to him, in the order of their reception, in books to be kept for that purpose and indexed to show —

- (1) The name of the vessel;
- (2) The names of the parties to the sale, conveyance, or mortgage;
- (3) The time and date of reception of the instrument;
- (4) The interest in the vessel so sold, conveyed, or mortgaged; and
- (5) The amount and date of maturity of the mortgage.

Subsection D. (a) A valid mortgage which, at the time it is made, includes the whole of any vessel of the United States of 200 gross tons and upwards, shall in addition have, in respect to such vessel and as of the date of the compliance with all the provisions of this subdivision, the preferred status given by the provisions of subsection M, if —

(1) The mortgage is indorsed upon the vessel's documents in accordance with the provisions of this section;

(2) The mortgage is recorded as provided in subsection C, together with the time and date when the mortgage is so indorsed;

(3) An affidavit is filed with the record of such mortgage to the effect that the mortgage is made in good faith and without any design to hinder, delay, or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel;

(4) The mortgage does not stipulate that the mortgagee waives the preferred status thereof; and

(5) The mortgagee is a citizen of the United States.

(b) Any mortgage which complies in respect to any vessel with the conditions enumerated in this subsection is hereafter in this section called a "preferred mortgage" as to such vessel.

(c) There shall be indorsed upon the documents of a vessel covered by a preferred mortgage —

(1) The name of the mortgagor and mortgagee;

(2) The time and date the indorsement is made;

(3) The amount and date of maturity of the mortgage; and

(4) Any amount required to be indorsed by the provisions of subdivision (e) or (f) of this subsection.

(d) Such indorsement shall be made (1) by the collector of customs of the port of documentation of the mortgaged vessel, or (2) by the collector of customs of any port in which the vessel is found, if such collector is directed to make the indorsement by the collector of customs of the port of documentation; and no clearance shall be issued to the vessel until such indorsement is made. The collector of

customs of the port of documentation shall give such direction by wire or letter at the request of the mortgagee and upon the tender of the cost of communication of such direction. Whenever any new document is issued for the vessel, such indorsement shall be transferred to and indorsed upon the new document by the collector of customs.

(e) A mortgage which includes property other than a vessel shall not be held a preferred mortgage unless the mortgage provides for the separate discharge of such property by the payment of a specified portion of the mortgage indebtedness. If a preferred mortgage so provides for the separate discharge, the amount of the portion of such payment shall be indorsed upon the documents of the vessel.

(f) If a preferred mortgage includes more than one vessel and provides for the separate discharge of each vessel by the payment of a portion of the mortgage indebtedness, the amount of such portion of such payment shall be indorsed upon the documents of the vessel. In case such mortgage does not provide for the separate discharge of a vessel and the vessel is to be sold upon the order of a district court of the United States in a suit in rem in admiralty, the court shall determine the portion of the mortgage indebtedness increased by 20 per centum (1) which, in the opinion of the court, the approximate value of the vessel bears to the approximate value of all the vessels covered by the mortgage, and (2) upon the payment of which the vessel shall be discharged from the mortgage.

Subsection E. The collector of customs upon the recording of a preferred mortgage shall deliver two certified copies thereof to the mortgagor who shall place, and use due diligence to retain, one copy on board the mortgaged vessel and cause such copy and the documents of the vessel to be exhibited by the master to any person having business with the vessel, which may give rise to a maritime lien upon the vessel or to the sale, conveyance, or mortgage thereof. The master of the vessel shall, upon the request of any such person, exhibit to him the documents of the vessel and the copy of any preferred mortgage of the vessel placed on board thereof.

Subsection F. The mortgagor (1) shall, upon request of the mortgagee, disclose in writing to him prior to the execution of any preferred mortgage, the existence of any maritime lien, prior mortgage, or other obligation or liability upon the vessel to be mortgaged, that is known to the mortgagor, and (2), without the consent of the mortgagee, shall not incur, after the execution of such mortgage and before the mortgagee has had a reasonable time in which to record the mortgage and have indorsements in respect thereto made upon the documents of the vessel, any contractual obligation creating a lien upon the vessel other than a lien for wages of stevedores when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, or for salvage, including contract salvage, in respect to the vessel.

Subsection G. (a) The collector of customs of the port of documentation shall, upon the request of any person, record notice of his claim of a lien upon a vessel covered by a preferred mortgage, together with the nature, date of creation, and amount of the lien, and the name and address of the person. Any person who has caused notice of his claim of lien to be so recorded shall, upon a discharge in whole or in part of the indebtedness, forthwith file with the collector of customs a certificate of such discharge. The collector of customs shall thereupon record the certificate.

(b) The mortgagor, upon a discharge in whole or in part of the mortgage indebtedness, shall forthwith file with the collector of customs for the port of documentation of the vessel, a certificate of such discharge. Such collector of customs shall thereupon record the certificate. In case of a vessel covered by a preferred mortgage, the collector of customs at the port of documentation shall (1) indorse upon the documents of the vessel, or direct the collector of customs at any port in which the vessel is found, to so indorse, the fact of such discharge, and (2) shall deny clearance to the vessel until such indorsement is made.

Subsection H. (a) No bill of sale, conveyance, or mortgage shall be recorded unless it states the interest of the grantor or mortgagor in the vessel, and the interest so sold, conveyed, or mortgaged.

(b) No bill of sale, conveyance, mortgage, notice of claim of lien, or certificate of discharge thereof, shall be recorded unless previously acknowledged before a notary public or other officer authorized by a law of the United States, or of a State, Territory, District, or possession thereof, to take acknowledgment of deeds.

(c) In case of a change in the port of documentation of a vessel of the United States, no bill of sale, conveyance, or mortgage shall be recorded at the new port of documentation unless there is furnished to the collector of customs of such port, together with the copy of the bill of sale, conveyance, or mortgage to be recorded, a certified copy of the record of the vessel at the former port of documentation furnished by the collector of such port. The collector of customs at the new port of documentation is authorized and directed to record such certified copy.

(d) A preferred mortgage may bear such rate of interest as is agreed by the parties thereto.

Subsection I. Each collector of customs shall permit records made under the provisions of this section to be inspected during office hours, under such reasonable regulations as the collector may establish. Upon the request of any person the collector of customs shall furnish him from the records of the collector's office (1) a certificate setting forth the names of the owners of any vessel, the interest held by each owner, and the material facts as to any bill of sale or conveyance of, any mortgage covering, or any lien or other incumbrance upon, a specified vessel, (2) a certified copy of any bill of sale, conveyance, mortgage, notice of claim of lien, or certificate of

discharge in respect to such vessel, or (3) a certified copy as required by subdivision (c) of subsection H. The collector of customs shall collect a fee for any bill of sale, conveyance, or mortgage recorded, or any certificate or certified copy furnished, by him, in the amount of 20 cents a folio with a minimum charge of \$1.00. All such fees shall be covered into the Treasury of the United States as miscellaneous receipts.

PENALTIES.

Subsection J. (a) If the master of the vessel willfully fails to exhibit the documents of the vessel or the copy of any preferred mortgage thereof, as required by subsection E, the board of local inspectors of vessels having jurisdiction of the license of the master, may suspend or cancel such license, subject to the provisions of "An Act to provide for appeals from decision of boards of local inspectors of vessels and for other purposes," approved June 10, 1918.

(b) A mortgagor who, with intent to defraud, violates any provision of subsection F, and if the mortgagor is a corporation or association, the president or other principal executive officer of the corporation or association, shall upon conviction thereof be held guilty of a misdemeanor and shall be fined not more than \$1,000 or imprisonment not more than 2 years, or both. The mortgaged indebtedness shall thereupon become immediately due and payable at the election of the mortgagee.

(c) If any person enters into any contract secured by, or upon the credit of, a vessel of the United States covered by a preferred mortgage, and suffers pecuniary loss by reason of the failure of the collector of customs, or any officer, employee, or agent thereof, properly to perform any duty required of the collector under the provisions of this section, the collector of customs shall be liable to such person for damages in the amount of such loss. If any such person is caused any such loss by reason of the failure of the mortgagor, or master of the mortgaged vessel, or any officer, employee, or agent thereof, to comply with any provision of subsection E or F or to file an affidavit as required by subdivision (a) of subsection D, correct in each particular thereof, the mortgagor shall be liable to such person for damages in the amount of such loss. The district courts of the United States are given jurisdiction (but not to the exclusion of the courts of the several States, Territories, Districts, or possessions) of suits for the recovery of such damages, irrespective of the amount involved in the suit or the citizenship of the parties thereto. Such suit shall be begun by personal service upon the defendant within the limits of the district. Upon judgment for the plaintiff in any such suit, the court shall include in the judgment an additional amount for costs of the action and a reasonable counsel's fee, to be fixed by the court.

FORECLOSURE OF PREFERRED MORTGAGES.

Subsection K. A preferred mortgage shall constitute a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by such vessel. Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit in rem in admiralty. Original jurisdiction of all such suits is granted to the district courts of the United States exclusively. In addition to any notice by publication, actual notice of the commencement of any such suit shall be given by the libellant, in such manner as the court shall direct, to (1) the master, other ranking officer, or caretaker of the vessel, and (2) any person who has recorded a notice of claim of an undischarged lien upon the vessel, as provided in subsection G, unless after search by the libellant satisfactory to the court, such mortgagor, master, other ranking officer, caretaker, or claimant is not found within the United States. Failure to give notice to any such person, as required by this subsection, shall not constitute a jurisdictional defect; but the libellant shall be liable to such person for damages in the amount of his interest in the vessel terminated by the suit. Suit in personam for the recovery of such damages may be brought in accordance with the provisions of subdivision (c) of subsection J.

Subsection L. In any suit in rem in admiralty for the enforcement of the preferred mortgage lien, the court may appoint a receiver and, in its discretion, authorize the receiver to operate the mortgaged vessel. The marshal may be authorized and directed by the court to take possession of the mortgaged vessel notwithstanding the fact that the vessel is in the possession or under the control of any person claiming a possessory common-law lien.

Subsection M. (a) When used hereinafter in this section, the term "preferred maritime lien" means (1) a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this section; or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.

(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit in rem in admiralty for the enforcement of a preferred mortgage lien thereon, all preëxisting claims in the vessel, including any possessory common-law lien of which a lienor is deprived under the provisions of subsection L shall be held terminated and shall thereafter attach, in like amount and in accordance with their respective priorities, to the proceeds of the sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the court.

Subsection N. (a) Upon the default of any term or condition of

a preferred mortgage upon a vessel, the mortgagee may, in addition to all other remedies granted by this section, bring suit in personam in admiralty in a district court of the United States, against the mortgagor for the amount of the outstanding mortgage indebtedness secured by such vessel or any deficiency in the full payment thereof.

(b) This section shall not be construed, in the case of a mortgage covering, in addition to vessels, realty or personalty other than vessels, or both, to authorize the enforcement by suit in rem in admiralty of the rights of the mortgagee in respect to such realty or personalty other than vessels.

TRANSFERS OF MORTGAGED VESSELS AND ASSIGNMENT OF VESSEL MORTGAGES.

Subsection O. (a) The documents of a vessel of the United States covered by a preferred mortgage may not be surrendered (except in the case of the forfeiture of the vessel or its sale by the order of any court of the United States or any foreign country) without the approval of the board. The board shall refuse such approval unless the mortgagee consents to such surrender.

(b) The interest of the mortgagee in a vessel of the United States covered by a mortgage, shall not be terminated by the forfeiture of the vessel for a violation of any law of the United States, unless the mortgagee authorized, consented, or conspired to effect the illegal act, failure, or omission which constituted such violation.

(c) Upon the sale of any vessel of the United States covered by a preferred mortgage, by order of a district court of the United States in any suit in rem in admiralty for the enforcement of a maritime lien other than a preferred maritime lien, the vessel shall be sold free from all preëxisting claims thereon; but the court shall, upon the request of the mortgagee, the libellant, or an intervenor, require the purchaser at such sale to give and the mortgagor to accept a new mortgage of the vessel for the balance of the term of the original mortgage. The conditions of such new mortgage shall be the same, so far as practicable, as those of the original mortgage and shall be subject to the approval of the court. If such new mortgage is given, the mortgagee shall not be paid from the proceeds of the sale and the amount payable as the purchase price shall be held diminished in the amount of the new mortgage indebtedness.

(d) No rights under a mortgage of a vessel of the United States shall be assigned to any person not a citizen of the United States without the approval of the board. Any assignment in violation of any provision of this section shall be void.

(e) No vessel of the United States shall be sold by order of a district court of the United States in any suit in rem in admiralty to any person not a citizen of the United States.

MARITIME LIENS FOR NECESSARIES.

Subsection P. Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessities, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

Subsection Q. The following persons shall be presumed to have authority from the owner to procure repairs, supplies, towage, use of dry dock or marine railway, and other necessities for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

Subsection R. The officers and agents of a vessel specified in subsection Q shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel; but nothing in this section shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessities was without authority to bind the vessel therefor.

Subsection S. Nothing in this section shall be construed to prevent the furnisher of repairs, supplies, towage, use of dry dock or marine railway, or other necessities, or the mortgagee, from waiving his right to a lien, or in the case of a preferred mortgage lien, to the preferred status of such lien, at any time, by agreement or otherwise; and this section shall not be construed to affect the rules of law now existing in regard to (1) the right to proceed against the vessel for advances, (2) laches in the enforcement of liens upon vessels, (3) the right to proceed in personam, (4) the rank of preferred maritime liens among themselves, or (5) priorities between maritime liens and mortgages, other than preferred mortgages, upon vessels of the United States.

Subsection T. This section shall supersede the provisions of all State statutes conferring liens on vessels, in so far as such statutes purport to create rights of action to be enforced by suits in rem in admiralty against vessels for repairs, supplies, towage, use of dry dock or marine railway, and other necessities.

MISCELLANEOUS PROVISIONS.

Subsection U. This section shall not apply (1) to any existing mortgage, or (2) to any mortgage hereafter placed on any vessel now under an existing mortgage, so long as such existing mortgage remains undischarged.

Subsection V. The Secretary of Commerce is authorized and

directed to furnish collectors of customs with all necessary books and records, and with certificates of registry and of enrollment and license in such form as provides for the making of all indorsements thereon required by this section.

Subsection W. The Secretary of Commerce is authorized to make such regulations in respect to the recording and indorsing of mortgages covering vessels of the United States, as he deems necessary to the efficient execution of the provisions of this section.

Subsection X. Sections 4192 to 4196, inclusive, of the Revised Statutes of the United States, as amended, and the Act entitled "An Act relating to liens on vessels for repairs, supplies, or other necessities," approved June 23, 1910, are repealed. This section, however, so far as not inconsistent with any of the provisions of law so repealed, shall be held a reenactment of such repealed law, and any right or obligation based upon any provision of such law and accruing prior to such repeal, may be prosecuted in the same manner and to the same effect as if this Act had not been passed.

SEC. 31. That section 4530 of the Revised Statutes of the United States is amended to read as follows:

"SEC. 4530. Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the balance of his wages earned and remaining unpaid at the time when such demand is made at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void: *Provided*, Such a demand shall not be made before the expiration of, nor oftener than once in, five days nor more than once in the same harbor on the same entry. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall be then due him, as provided in section 4529 of the Revised Statutes: *Provided further*, That notwithstanding any release signed by any seaman under section 4552 of the Revised Statutes any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require: *And provided further*, That this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement."

SEC. 32. That paragraph (a) of section 10 of the Act entitled "An Act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade, and for other purposes," approved June 26, 1884, as amended, is hereby amended to read as follows:

"SEC. 10. (a) That it shall be, and is hereby, made unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages, or to

make any order, or note, or other evidence of indebtedness therefor to any other person, or to pay any person, for the shipment of seamen when payment is deducted or to be deducted from a seaman's wages. Any person violating any of the foregoing provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than \$25 nor more than \$100, and may also be imprisoned for a period of not exceeding six months, at the discretion of the court. The payment of such advance wages or allotment, whether made within or without the United States or territory subject to the jurisdiction thereof, shall in no case except as herein provided absolve the vessel or the master or the owner thereof from the full payment of wages after the same shall have been actually earned, and shall be no defense to a libel suit or action for the recovery of such wages. If any person shall demand or receive, either directly or indirectly, from any seaman or other person seeking employment, as seaman, or from any person on his behalf, any remuneration whatever for providing him with employment, he shall for every such offense be deemed guilty of a misdemeanor and shall be imprisoned not more than six months or fined not more than \$500."

SEC. 33. That section 20 of such Act of March 4, 1915, be, and is, amended to read as follows:

"SEC. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

SEC. 34. That in the judgment of Congress, articles or provisions in treaties or conventions to which the United States is a party, which restrict the right of the United States to impose discriminating customs duties on imports entering the United States in foreign vessels and in vessels of the United States, and which also restrict the right of the United States to impose discriminatory tonnage dues on foreign vessels and on vessels of the United States entering the United States should be terminated, and the President is hereby authorized and directed within ninety days after this Act becomes law to give notice to the several Governments, respectively, parties to such treaties or conventions, that so much thereof as imposes any such restriction on the United States will terminate on the expiration of such periods as may be required for the giving of such notice by the provisions of such treaties or conventions.

SEC. 35. That the power and authority vested in the board by this Act, except as herein otherwise specifically provided, may be exercised directly by the board, or by it through the United States Shipping Board Emergency Fleet Corporation.

SEC. 36. That if any provision of this Act is declared unconstitutional or the application of any provision to certain circumstances be held invalid, the remainder of the Act and the application of such provisions to circumstances other than those as to which it is held invalid shall not be affected thereby.

SEC. 37. That when used in this Act, unless the context otherwise requires, the terms "person," "vessel," "documented under the laws of the United States," and "citizen of the United States" shall have the meaning assigned to them by sections 1 and 2 of the "Shipping Act, 1916," as amended by this Act; the term "board" means the United States Shipping Board; and the term "alien" means any person not a citizen of the United States.

SEC. 38. That section 2 of the Shipping Act, 1916, is amended to read as follows:

"SEC. 2. (a) That within the meaning of this Act no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and, in the case of a corporation, unless its president and managing directors are citizens of the United States and the corporation itself is organized under the laws of the United States or of a State, Territory, District, or possession thereof, but in the case of a corporation, association, or partnership operating any vessel in the coastwise trade the amount of interest required to be owned by citizens of the United States shall be 75 per centum.

"(b) The controlling interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if the majority of the voting power in such corporations is not vested in citizens of the United States; or (c) if through any contract or understanding it is so arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

"(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to 75 per centum of its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if 75 per centum of the voting power in such corporations is not vested in citizens of the United States; or (c) if, through any contract or understanding it is so

arranged that more than 25 per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of any interest in the corporation in excess of 25 per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

"(d) The provisions of this Act shall apply to receivers and trustees of all persons to whom the Act applies, and to the successors or assignees of such persons."

SEC. 39. That this Act may be cited as the Merchant Marine Act, 1920.

Approved June 5, 1920.

APPENDIX III

PROTEST

The following is a specimen of a marine protest. It is taken from *Lawrence v. Minturn*, 17 How. 100. It was signed by all the officers and by such of the crew as could write:

August 29, 1851, Latitude $31^{\circ} 0' N.$, Longitude $61^{\circ} 5' W.$

At sea, on board ship *Hornet* of New York, William W. Lawrence, master, bound from New York to San Francisco, California.

We, the undersigned, master, officers and mariners of the ship *Hornet*, of New York, do, after mature and serious deliberation, enter this solemn protest: That on August 26th, 1851, the ship *Hornet* being then in or about the longitude of $49^{\circ} W.$, latitude $37^{\circ} N.$, experiencing a gale of wind from the south, veering to N. W.: and that during said gale, which lasted until the night of the 27th of August, the weight of the deck load, consisting of two boilers, with furnaces attached, and two steam chimneys (the whole supposed to be of the weight of forty tons or thereabouts), did cause the ship to labor very hard, rolling gunwale deep, shipping large bodies of water, straining the ship in her upper works and decks, causing the ship to leak badly, and her pumps constantly worked, placing our lives, ship and cargo in imminent peril for their safety. We now, therefore, do most seriously and solemnly assert, that for the future preservation of the ship, and thereby our lives and cargo, the said boilers, furnaces and chimneys are unsafe on the decks, and for the safety of the whole should be thrown overboard as soon as possible, the weather and sea permitting.

In testimony whereof to the above, we hereby subscribe our respective names.

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